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REPORTS OF CASES
DECIDED
IN THE
COURT OF COMMON PLEAS
OF
UPPER CANADA;

FROM EASTER TERM, 21 VICTORIA, TO HILARY TERM, 22 VICTORIA.

BY
EDWARD C. JONES, ESQUIRE,
BARRISTER-AT-LAW.

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JUDGES

OF

THE COURT OF COMMON PLEAS,

DURING THE PERIOD OF THESE REPORTS.

THE HON. WILLIAM HENRY DRAPER, C. J.

“ “ WILLIAM BUEL RICHARDS, J.

“ “ JOHN HAWKINS HAGARTY, J.

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REPORTS OF CASES
IN THE
COURT OF COMMON PLEAS.

EASTER TERM, 21 VICTORIA.

Present :

The Hon. WILLIAM HENRY DRAPER, C. J.

“ “ WILLIAM BUELL RICHARDS, J.

“ “ JOHN HAWKINS HAGARTY, J.

SCOULER V. SCOULER.

Devisee.

Devisee.
A testator died bequeathing his property both real and personal to his ~~nephew~~, but upon certain conditions which were proved to have been performed, with this further bequest that the said J. S'. (the devisees') mother and my youngest daughter C. shall have a lien or claim upon the said lands and tenements as a home during the time of either of their natural lives, then after their decease the same shall revert to the said J. S., and his heirs for ever.,,,

Held, that a joint estate for life passed to the testator's two daughters, remainder to the survivor for her life, with a remainder in fee to the nephew.

Held, further, the plaintiff's right of action did not accrue till after the death of the tenants for life.

EJECTMENT for the rear half of No. 26, 10th Concession of Lanark. Defence general. The plaintiff gave notice that he claimed title by devise from Robert Scouler deceased, grantee of the Crown. The defendant gave notice that he claimed title as eldest son of the said Robert Scouler, by possession and improvements made under the said Robert Scouler; that the devise to plaintiff was subject to a condition not performed, and therefore never took effect, but for the

purposes of this action the defendant asserts only a possession of thirteen years.

The trial took place at Perth, in October, 1857, before the Chief Justice of Upper Canada. The will of Robert Scouler, (whose title as Grantee of the Crown was admitted by both parties,) dated 31st July, 1857, was proved. It contained as follows: I do leave and bequeath to John Scouler, son of my daughter Margaret, all my estate real as well as personal that I may be possessed of at the time of my demise, the land and tenements being the rear half of lot number twenty, in the 10th concession of the township of Lanark, providing he supports me with sufficient meat, board, washing and lodging, or causes me to be supplied in the same during the time of my natural life, and further, I order that the said John Scouler's mother and my youngest daughter Cecily shall have a lien or claim on the said lands and tenements as a home during the term of either of their natural lives, then after their decease the same shall revert to the said John Scouler and his heirs for ever. The testator died the 9th of November, 1852. He had lived with his daughter Catharine Hogg from the May preceding his death, and died at her residence. Evidence was given to shew that the testator was satisfied with plaintiff, and up to the last, spoke of his will in favour of plaintiff, and of his having given his land to him.

The jury under the direction of the learned Chief Justice found a verdict for the plaintiff, leave being reserved to the defendant to move to enter a nonsuit, on the ground of the will giving a life estate to plaintiff's mother and her sister.

In Michaelmas Term, *S. Richards* obtained a rule *nisi* for a nonsuit on the leave reserved, or for a new trial on the ground that it was not proved that the plaintiff fulfilled the condition of supporting the testator in his life time, and that the verdict is against law and evidence.

In the following term, *Patterson* shewed cause. He argued that the question of the condition was submitted to the jury and properly found for plaintiff, citing *Parsons v. Lanoe*, 1 Ves. 190, *Sinclair v. Hone*, 6 Ves. 607.

S. Richards, contra, cited *Doe Thomas v. Humberstone*,

3 U. C. Rep., Old Series, 516 ; Doe v. Collins, 7 U. C. Q. B. 519.

DRAPER, C. J., delivered the judgment of the court.

I think there is no ground for a new trial, for if the question turned upon the first point, there was evidence enough to satisfy any reasonable person that the testator himself was satisfied that the plaintiff should take the land, having complied with all he contemplated, and it is an important fact, that at the time of the making the will the plaintiff was scarcely twenty years of age.

But it is quite unnecessary to enter into that question, if the plaintiff's mother and aunt took each a life estate in the premises, for then this action is prematurely brought, as they are both living. And this is, I think, the proper construction of the will. I had some difficulty with the words directing that they "shall have a *lien* or *claim* upon the said lands and tenements *as a home* during the terms of either of their natural lives," but taken in connexion with what follows, "then after their demise the same shall *revert* to the said John Scouler and his heirs for ever." I think the testator's intention is sufficiently plain. The general words at the commencement of the will would give the plaintiff a fee simple, subject to the fulfilment of the reserved condition ; but this is qualified by what follows, and I think the proper construction of the will is, that the testator's two daughters (named in the will) take an estate for their joint lives, remainder to the survivor for her life, remainder in fee to the plaintiff.

As a consequence the rule must be made absolute to enter a nonsuit.

MAXWELL V. FERRIE.

Arrest—Ca. Sa.—Affidavit.

Held, That a party making an assignment for the benefit of his creditors to prevent his goods being taken in execution at the suit of one of his creditors who had recovered a judgment against him, was liable to arrest. It is sufficient to swear either fact—that the debtor had parted with his property to prevent its being taken in execution—or that he had made some secret or fraudulent conveyance to prevent its being taken in execution.

CASE for maliciously and without reasonable or probable

cause, causing plaintiff to be arrested on a *ca. sa.* Plea, not guilty.

The trial took place in November last, at Stratford, before *Burns, J.*

The plaintiff proved the affidavit to warrant the writ was made by the defendant, John Ferrie, on the 28th August, 1856, concluding thus: "This deponent hath good reason to believe and doth verily believe that the said defendant" (the now plaintiff) "*hath parted with his property*, or made some secret or fraudulent conveyance thereof in order to prevent its being taken in execution." The defendants were judgment creditors of the plaintiff, having commenced their action by writ of summons issued the 27th of February, 1856. On the 11th of March following they declared, the defendant pleaded on the 18th of March, and on the 31st of the same month he gave a *cognovit actionem* with a stay of execution until the 2nd June following. The judgment was entered on the 16th April, 1856. The debt was £570 12s 10d. On the 31st May, 1856, the plaintiff made an assignment of his goods and effects to one Carpenter, himself a creditor, for the benefit of all his, the plaintiff's, creditors. A few days before the 2nd June, 1856, the plaintiff and his attorney went to the defendants, and endeavoured to make an arrangement to gain a month's further time. The defendants were willing if the plaintiff could give them a named indorser for the whole amount. This he could not do. Other proposals were made, Carpenter being offered as an indorser for part of the debt, dividing it into four payments, one amount immediately, the others at 3, 6 and 9 months. Defendants declined, by expressing their want of confidence in Carpenter and another of the indorsers offered. These proposals were, as appeared, all made to prevent defendants issuing execution, and winding plaintiff's business up. When all proposals for their purpose failed, the plaintiff made this assignment, which was filed in the county court office on the 3rd June, 1856. The plaintiff's attorney said the assignment was undoubtedly made to prevent defendants' execution from taking plaintiff's goods. Carpenter and some others, not including defendants, were preferred creditors in

this assignment. The defendants were told that unless they came into some arrangement the plaintiff would have to make an assignment. They were satisfied to give the three, six, and nine months, if they got the notes properly indorsed, *i.e.*, by parties whom they approved. Evidence was given to shew that but for the defendants' pressure, and the alleged necessity of preventing their execution, the plaintiff could have gone on in business, and paid his debts; and that his being put under arrest and confined to the jail limits had been a great injury to him. Carpenter, as assignee, afterwards sold off plaintiff's goods at 16s. in the pound. The defendants gave some evidence to shew that Carpenter was not a safe party to accept as an indorser, and confirming the assertion that the assignment was made to delay them.

The learned judge in leaving the case to the jury pointed out that the affidavit, which follows the words of the statute, was in the alternative, and that in his opinion the legislature did not mean that the first alternative, the parting with his property, by a debtor, in order to prevent its being taken in execution, should be accompanied with circumstances of fraud, in order to justify a judgment creditor in taking the body of his debtor in execution. That he thought the defendants might have taken either of the alternatives in the affidavit, without taking the other, and the affidavit would have been legally sufficient to warrant the issuing of the writ, and that if the defendants in this case had only stated that they had reason to believe that the plaintiff had parted with his property in order to prevent its being taken in execution, the affidavit would have been strictly true.

The jury found for the defendants.

In Michaelmas Term *J. S. Macdonald*, Q. C., obtained a rule *nisi* for a new trial on the law and evidence and for misdirection.

In Easter Term *Burton* shewed cause. He cited *Aitken v. Bullock*, 11 U. C. Q. B. 19.

S. Richards, contra, cited *Bowen v. Bramidge*, 6 C. & P. 142; *Taylor v. Whittemore*, 10 Q. B. U. C. 440; *Riches v. Evans*, 9 C. & P. 640; *Wood v. Dixie*, 7 Q. B. 897.

DRAPER, C. J.—I am of opinion this rule should be discharged. I agree with the learned judge at the trial, that the affidavit is meant in its terms to be not cumulative but alternative, and we are told that it had been so decided in some previous case, though I have been unable to find it. But on the language of the statute I am quite prepared to hold that an affidavit stating that the deponent had reason to believe, and verily did believe, that his debtor had parted with his property in order to prevent its being taken in execution, or that he had made some secret or fraudulent conveyance thereof in order to prevent its being taken in execution, would be sufficient. To hold the contrary would in my opinion be to set a snare for a party, for if *both* must be sworn, so *both* must exist, and we must hold that the act of parting with the property in order to prevent its being taken in execution *per se.*, does not entitle the plaintiff to sue out a *ca. sa.* The circumstances of the present case shew sufficient reason to uphold this view. The defendants had recovered judgment for a large sum ; so far as the evidence discloses no other creditor had been equally vigilant in prosecuting his claims. The plaintiff after a plea, evidently for time, gives a *cognovit* gaining two months' delay. At the expiration of that time he negotiates for longer delay, extending over nine months, offering indorsers. The defendants are willing to give the extension ; but object to the indorsers, and as the result shewed with sufficient cause as to one ; and then to deprive the defendants of the fruits of the judgment so confessed, the plaintiff assigns every thing that a *fi. fa.* against goods could reach, gives priority of payment thereby to certain creditors, who had not sued him, and leaves the plaintiffs to be paid after these favored creditors are satisfied. If, under these circumstances, the defendants could not safely make the affidavit, and if these circumstances do not prove the first part of this affidavit to be true, namely, that the plaintiff parted with his property to prevent its being taken in execution, then I can conceive no case that would justify such a course being taken. I think it impossible to hold that there was a want of reasonable or probable cause, or the slightest proof of malice in fact, and therefore am of opinion this rule should be discharged.

Rule discharged.

MAULSON ET AL. V. JOSEPH.

Registration—assignment—Possession.

Held, that assignments for the general benefit of creditors come within the provisions of the statute 20 Vic., ch. 3, and must be registered under that act, unless accompanied by an immediate delivery and an actual and continued change of possession.

This was an interpleader issue to try whether certain goods taken in execution by the sheriff of York and Peel, under a *fi. fa.* tested the 9th of November, 1857, for having execution of a judgment recovered by the defendant against Amos Bostwick, Hugh McDonnell and Duncan McDonnell, were at the time of the delivery of the writ to the sheriff the property of the plaintiff as against the defendant.

At the trial in April last, before *Hagarty, J.*, at Toronto, the plaintiffs proved a deed of assignment from Amos Bostwick and Hugh McDonnell to themselves, dated 20th of October, 1857, assigning all their stock in trade in their shop on the south side of King street, in the city of Toronto, in trust for creditors. This assignment was not filed in the office of the clerk of the county court under the statute. After the deed was executed the assignees carried on the business; they opened new books; all moneys received were paid over to them, and receipts for payments were given in their name. Amos Bostwick, one of the assignors, swore he ceased to have any thing to do with it after the assignment was executed. The sheriff levied on the goods mentioned in the assignment, after the 11th of November, 1857, and three or four weeks after the assignment was made. It further was proved that the assignees were not creditors of Bostwick and McDonnell. Amos Bostwick stated that he might have sold goods after the assignment; that he attended generally just as before, and his partner Hugh McDonnell remained attending just as he did. That the shop was open until February, when it was finally closed. The young men employed in the shop lived over it; but that he (Amos Bostwick) did not act as a principal as before, for all bills of parcels and all receipts were taken and given in the assignees' names. The name on a large signboard, "Bostwick and McDonnell," was taken down about two

weeks after the assignment at the request of the assignees, but it remained on the brass in which the outside shutters run. The plaintiff, Maulson, visited the establishment every day, staying half an hour more or less. He sent a young man named Boomer to take charge on the day of the assignment, who staid six weeks or so, and after Boomer left he sent another to make up the books. Maulson received the money, and took the money received to deposit in the bank. One Nasmyth, a creditor, executed the assignment on the 22nd of October, 1857. No other evidence of execution by any creditor of the firm was given.

The learned judge left it to the jury to say whether the sale or deed was accompanied by an immediate delivery and followed by an actual and continuous change of possession of the goods. The learned judge intimated his own opinion that the evidence of change of possession was insufficient; there was no visible change; as far as the public were concerned things appeared to go on as usual.

It was urged for the plaintiff that a trust deed for creditors is not within the provisions of the 20th Vic., ch. 3. The learned judge held otherwise. The jury found for the plaintiff.

In Easter term, *A. Crooks* obtained a rule *nisi* for a new trial, the verdict being contrary to law and evidence, as there was no actual and combined change of possession of the goods pursuant to the statute, and the verdict being perverse and contrary to the judge's charge.

Boomer shewed cause. He argued that the evidence was amply sufficient to warrant the jury in finding an actual change of possession so as to prevent the deed of assignment being deemed void under the statute 20 Vic., ch. 3. But he further urged that a deed of assignment in trust for the benefit of the creditors of the assignor, did not come within the provisions of that statute at all. He cited *Holmes v. Vancamp*, 10 Q. B. U. C. 510; *Taylor v. Whittemore*, *ib.* 440; *Baldwin v. Benjamin*, 16 Q. B. U. C. 52.

A. Crooks, contra, argued that the statute 20 Vic., ch. 3, was comprehensive enough in its terms to include all conveyances. The exception of mortgages of vessels registered

under our statute 8th Vic., ch. 5, proved it to be the intention of the act not to leave any question open as to what is not included within it. In the imperial statute 17 & 18 Vic., ch. 36, sec. 7, assignments in favour of creditors are expressly excepted. He referred also to Heward and Mitchell (11 U. C. Q. B. 625) as shewing that bills of sale in trust for creditors were within the former statutes 12 Vic., ch. 74, and 13 & 14 Vic., ch. 62. As to the change of possession, he argued that it was in truth as much a question of law as of fact, for the sufficiency of the change as proved to transfer the property must eventually be decided by the court; referring to a case 26 Vermont Reports, 63. That the change of possession in the case was merely colourable, for the assignors still remained as before attending in the store. Wordall v. Smith, 1 Camp. 333, shewed that sending a person to be in possession with them did not constitute a change of possession. He referred also to Walton v. England, 3 Jur. N. S. 294; Mowitt v. Gzowski, 5 Grant. Ch. R. 555; 2 Kent's Comm. 528.

DRAPER, C. J.—I am of opinion the learned judge was right at the trial, and that sales of chattels, though in trust for the benefit of creditors, come within the province of the statute 20 Vic., ch. 3. The provisions of the second section are, that *every* sale of goods and chattels which shall not be accompanied by an immediate delivery, and followed by an actual and continued change of possession of the goods and chattels sold shall be in writing, and such writing shall be a conveyance under the provisions of this act, and shall be accompanied by an affidavit of a witness thereto of the due execution thereof, and an affidavit of the bargainee (or his agent duly authorised in writing to take such conveyance, a copy of which authority shall be attached to such conveyance,) that the sale is *bonâ fide* and for good consideration, as set forth in the said conveyance, and not for the purpose of holding or enabling the bargainee to hold the goods mentioned therein against the creditors of the bargainor, and shall be registered as hereinafter provided within five days from the executing thereof, otherwise such sale shall be absolutely

void as against the creditors of the bargainor and as against subsequent purchasers or mortgagees in good faith.

I do not perceive any reason that the bargainees could not have made oath that the sale to them was *bonâ fide* and for good consideration, as set forth in the said conveyance. Whether the consideration be a pecuniary one, or only nominally pecuniary, but in reality the payment and satisfaction of creditors of the bargainor, either all his creditors or a preferred class of them, the bargainee must know the fact, and can state it in his affidavit, which I incline to think is meant, though the words used "for good consideration as set forth in the conveyance," may import that it is only necessary to use these precise words in the affidavit, and that such a reference to the conveyance to ascertain the particulars of the consideration will be sufficient. That he ought to be able to make the residue of the affidavit in a case where the professed trust is for creditors, cannot be well doubted. If he cannot, then the professed trust is a sham and the deed a fraud. The former act, 13 & 14 Vic., ch. 64, expressly required the consideration to be set forth in the affidavit, and the change in the form of the expression does not lead me to think any thing different is meant by the present statute.

Holding the opinion that the conveyance comes within the meaning of the statute, it will by the express enactment be void as against the defendant in this case, not having been registered, unless it was accompanied by an immediate delivery, and was followed by an actual and continued change of possession. The evidence of this is all contained in the statement that one of the assignees sent a young man to take charge on the day of the assignment, who staid six weeks or so, and after that young man left another was sent to make up the books; that the same assignee received all the money coming in on the business; that a new set of books were opened, and bills of parcels were made out, and receipts given in the names of the assignees. The business was carried on in this way until February, some three or four months, though no provision has been brought under our notice in the bill of sale requiring this. But during all

that time Bostwick and Hugh McDonell were in daily attendance just as before, even selling goods occasionally. The removal of the sign was one step indicating a change of possession, but the name Bostwick and McDonell remained as before on one part of the premises fronting on the street, and there was no evidence given at the trial of any steps taken to give publicity to the transaction.

In *Edwards v. Harbin* (2 T. R. 587), the court said they considered that if there was nothing but the absolute conveyance without the possession, that *in point of law* was fraudulent; and in that case *Buller, J.*, and all the other judges were unanimously of opinion that, "unless possession accompanies and follows the deed, it is fraudulent and void." The language of our statute closely follows that used in this judgment.

The strong language of Lord Ellenborough in *Wordall v. Smith*, 1 Camp. 333, see *Latimer v. Batson*, 4 B. & C. 652, had perhaps received some qualification in later cases. He observes, "To defeat the execution there must have been a *bona fide* substantial change of possession. It is a mere mockery to put another person in to take possession jointly with the former owner of the goods. A concurrent possession with the assignor is colourable; there must be an exclusive possession under the assignment, or it is fraudulent and void as against creditors.

I think we are bound not to relax in the slightest degree any one of those rigid rules which have from time to time been laid down by the courts, and may be said to be sanctioned by all the authority of the legislature to protect creditors against fraud. The universal habit, for so I think we are justified in terming it, now prevalent, of making assignments of a debtor's property and effects, so that the sheriff rarely can execute a *fi. fa.*, imposes on the court a duty carefully to sift every transaction of that description that is brought before them, and to see that all is clearly right; and though the question of fraud or no fraud must be disposed of by the jury, our duty is to take care that these conclusions are sufficiently warranted by the evidence before them.

In the present case, it appears to me, the evidence to sustain the assignment was slight and unsatisfactory. I should apprehend the case would easily be made stronger one way or the other, and I think the question ought to be submitted to another jury for their opinion.

In my opinion there should be a new trial, costs to abide the event.

RICHARDS, J.—I quite agree that the statute extends to the assignment in question, and unless under it there was the requisite delivery and continuous change of possession of the property assigned, plaintiffs ought not to recover.

I do not think the evidence in this case shews in a satisfactory manner such a delivery and change of possession of the property as the statute requires, and I am therefore prepared to concur with the rest of the court in granting a new trial on the terms proposed.

Inasmuch however as too other cases brought in the Court of Queen's Bench, in favour of the same plaintiffs, claiming under the same assignment, were tried before me at the last Toronto assizes, in which verdicts were given for the plaintiffs, I deem it right to say there was further evidence given on those trials to sustain the assignment. The more prominent points referred to in the additional evidence, were notice of the assignment in the public newspapers; express notice to each of the defendants of the assignment; and notices of the assignment put up in the place of business of the assignors and of the sale of the stock by the assignees.

I cannot say I am dissatisfied with the verdicts in those cases, and it may be well for the defendant to consider the further evidence given in those cases before taking out his rule in this.

New trial, costs to abide the event.

HOLLOWELL V. MACDONELL ET AL.

Promissory note—Limited liability act.

Upon an action brought on a promissory note and bill of exchange against two of the special partners of a partnership formed under the limited liability act (12 Vic., ch. 75) who had jointly made the note and accepted the bill for the accommodation of the general partner. The defendant pleaded a prior judgment recovered upon and taken in full satisfaction of all the causes of action in the declaration mentioned, against the general partner alone.

Held, that the recovery of the judgment against one of several joint contractors operated as a merger at law of the inferior remedy of action for the same debt, and that the plaintiff was not entitled to succeed.

DECLARATION on a bill of exchange dated 19th of April, 1854, drawn by plaintiff on defendants under the name, style, and firm of Donald Bethune and Co., for £267 19s. 8d., payable three months after date, averring that defendants under the name, &c., of D. Bethune & Co., accepted the bill but did not pay it. 2nd count on a promissory note, dated the 4th of July, 1854, made by defendants under the name, &c., of Donald Bethune & Co., in favour of one J. H. H. or order for £269 1s. 7d., payable on the 9th of August, then next, and indorsed by J. H. H. to plaintiff. Common counts.

9th plea, that the bill of exchange in the first, and the promissory note in the second counts mentioned, were accepted, and made by defendants jointly with and at the request of, and for the accommodation of one Donald Bethune, general partner of the limited partnership, trading under the limited partnership act by the name, style and firm of D. Bethune & Co., and that there never was any consideration for the acceptance or making of the said bill or note. That after the bill and note became due, and before the commencement of this suit, to wit, on the 9th of May, 1855, the said Donald Bethune, at the request of plaintiff, did by a *cognovit actionem*, wherein he was described as Donald Bethune, general partner of the limited partnership, trading under the limited partnership act under the name, &c., of Donald Bethune & Co., confess that the plaintiff had in that action sustained damages to £1000, besides costs, and that the true debt in that action was £798 19s. 4d. with interest from date, which cognovit the plaintiff received from the said D. Bethune in that action,

that afterwards, on the 5th of June, 1855, judgment was entered on the said cognovit, in the court of Queen's Bench, as by the record, &c. That such record is still in full force, and that the causes of action therein embrace and comprise the causes of action in the first and second counts, and all damages in respect thereof. That on taking the cognovit and recovering judgment thereon the plaintiff had full knowledge of the premises, and accepted the said cognovit in full satisfaction and discharge of all claims and rights of action against defendants in respect of the said causes of action.

10th plea to the whole declaration, that the firm of Donald Bethune & Co., was and still is a limited partnership, constituted under the act (12 Vic., ch. 75), whereof Donald Bethune hath been and still is sole general partner, and the defendants and others at the commencement thereof, and since hitherto have been, and are special partners under the provisions of the act. That the bill of exchange was accepted and the promissory note was made by D. Bethune for the limited partnership as such general partner, and the money alleged to be lent by plaintiff was lent to the limited partnership, and the money paid, &c., &c. And that all the causes of action mentioned in the declaration in respect whereof the plaintiff in his declaration claims £750, accrued against the limited partnership, and not otherwise. That defendants are sued in this action as partners in the said limited partnership, and not otherwise. That after the accruing of the said causes of action against the limited partnership, and before the commencement of this suit, to wit, on the 5th of June, 1855, the plaintiff impleaded the said D. Bethune as such general partner of the said limited partnership, under the name, &c., of D. Bethune & Co., in the Court of Queen's Bench (setting out a recovery for the same amount as in the last preceding plea, as well as that the judgment is still in force and is for the same causes of action as before.)

11th plea to the whole declaration, that all the said causes of action accrued to plaintiff against the defendants jointly with one Donald Bethune, and not against defendants, or either of them alone, and that plaintiff having such

causes of action against the defendants, and the said D. Bethune jointly, before the commencement of this suit, to wit, on the 5th of June, 1855, in the Court of Queen's Bench, impleaded the said D. Bethune in an action on promises by the description of Donald Bethune, general partner of the limited partnership trading under the limited partnership act under the name, &c., of Donald Bethune & Co., for that whereas the said Donald Bethune, on the first day of May, 1855, was indebted to the plaintiff in the sum of £1000, and being so indebted, promised the plaintiff to pay him the same on request, and although requested, refused so to do to the damage of plaintiff of £1000, and for and in respect of, and including the same identical causes of action in the declaration mentioned. And such proceedings, &c., (averring a recovery against Donald Bethune under the description aforesaid "on the occasion of the not performing the same identical promises in the said declaration mentioned as for his costs and charges, &c., *prout patet*) which said judgment is still in full force and is not reversed, &c.

Replication to the 9th plea on equitable grounds, that the judgment was recovered against D. Bethune as a general partner of a limited partnership; that before such recovery the defendants were falsely registered as and represented and held themselves out to plaintiff to be special partners of the said D. B. in the said limited partnership, and that as such special partners they were not liable to be sued jointly with the said D. B. for the said causes of action. That from the accruing of the said causes of action until after the recovery of the judgment, the plaintiff believed the defendants were such special partners; and under that belief the plaintiff proceeded and recovered judgment against the said D. B. alone as such general partner without any knowledge that the defendants were general partners with D. B. and jointly liable with him, and that after the recovery of the judgment the plaintiff first had knowledge that the defendants were general and not special partners of the said D. B. at the time of the making the bill and note in the declaration mentioned, and not having had any satisfaction of the judgment recovered against the said D. B. as such general partner the

plaintiff prosecuted the defendants for the said causes of action.

Replication to the 10th and 11th pleas, on equitable grounds the same as the foregoing replication.

Demurrer to the replications—grounds of demurrer: that although the defendants appeared as special partners when they were general partners, and although plaintiff was ignorant that defendants were general partners, yet the defendants are not now liable to plaintiff. That it appears plaintiff dealt alone with the said D. B. as general partner, and not with defendants; nor did he think or have any reason to think that he was dealing with or on the credit or liability of the defendants; that the plaintiff's remedy, if any, should be for a different cause of action or in a court of equity.

Joinder in demurrer.

J. H. Cameron, Q. C., for plaintiff. *Adam Wilson*, Q. C., for defendants, cited *Johnston v. Adams* 4 B. & A. 437.

DRAPER, C. J.—The plaintiff is suing for a joint debt, not for a debt joint and several. By the 9th plea the defendants admit themselves to be joint acceptors of the bill, and joint makers of the note; adding that they became such acceptors and makers for the accommodation of D. Bethune, general partner of the limited partnership of Donald Bethune & Co., and then they shew a judgment recovered against him in that character for the same cause of action on a cognovit given by him, and which is averred to have been accepted by the plaintiff in full satisfaction and discharge of the defendants.

The substance of the plea is that the plaintiff has recovered a judgment against Bethune, with whom the defendants were *jointly* liable, for the debts or causes of action declared upon in the first and second counts. The defence is not rested on the ground that the defendants were only special partners in the limited partnership carried on under the style and firm of Donald Bethune & Co.

The replication not denying any fact pleaded, sets up that the defendants were falsely registered as and represented

themselves to the plaintiff to be special partners in the limited partnership of Donald Bethune & Co., and that the plaintiff believed this and did not discover that they were general partners with Donald Bethune until after the recovery of this judgment. It is only in this inferential form that there is any allegation that the defendants were general partners; but the plaintiff treats this as an assertion of the fact, and concludes by stating that the judgment against Donald Bethune being wholly unproductive, he now sues defendants as having been jointly liable with Donald Bethune *ab initio*.

The equitable grounds relied on to take the case out of the decision in *King v. Hoare* (13 M. & W. 494) appear to be—1st. That there was a limited partnership under the style of D. Bethune & Co. 2nd. That the defendants were falsely registered as special partners in that limited partnership, not averring, however, that such registration was with their privity or procurement. 3rd. That they represented themselves to the plaintiff as such special partners. 4th. That plaintiff believing they were such special partners, recovered judgment against Donald Bethune alone; and 5th. That they have since discovered that the defendants were all along general partners with Donald Bethune, and therefore now sue them.

If the conclusion arrived at in *King v. Hoare*, namely, that, where judgment has been obtained for a debt, the right given by the record merges the inferior remedy by action for the same debt be correct, this ninth plea must be a bar in a court of law, for it shews the original cause of action to be gone. The matters stated in the replication do not and cannot as appears to me prevent this legal consequence of the recovery of the judgment against Donald Bethune, which operates as an extinguishment of the right to bring an action on the bill of exchange and promissory note against any persons who were jointly liable with him thereupon.

Some doubts have been occasionally thrown out in England—not, however, that I am aware in courts of law—on the decision in *King v. Hoare*. But I think we should view it as a binding

authority, and for myself I will add that I see no reason to differ from it. And, therefore, unless the equitable grounds replied displace the plea, our judgment must be for the defendants. I do not view these grounds as altering the effect of the judgment recovered. They do not shew that the original cause of action is not legally merged; but at the utmost (if they have that effect) they shew an equitable claim; but not the claim stated in the declaration. To give effect to this equitable claim would be, as is observed by Pollock C. B. in *Rais v. The Scottish Equitable Life Assurance Society*, (3 Jur. N. S. 417,) to allow a species of *departure* from the declaration. The plea in this case completely answers the declaration, by shewing that the cause of action though once existing is extinguished. The replication does not deny this as a legal answer, but sets up an equitable claim to recover on the ground that the plaintiff did not know that he could have maintained an action against these defendants until after he had recovered his judgment against Donald Bethune. Whether this will give him a right to any relief in a court of equity I do not profess to determine; but I think it cannot revive a cause of action which has been legally extinguished. And besides, the plea asserts that the plaintiff accepted the *cognovit actionem* from Donald Bethune "in full satisfaction and discharge of all claims and right of action whatever against the defendants for or in respect of the said causes of action in the said first and second counts," and does not rest the defence on the matter to which the replication more strictly applies. And whether the defendants were merely jointly liable with Donald Bethune as acceptors of the bill or makers of the note, or whether they were partners of Donald Bethune in the general acceptance of the term, the acceptance of a *cognovit actionem* from one "in full satisfaction and discharge," with the subsequent entry of judgment thereon, must be a defence if properly pleaded.

The tenth plea rests the defence on the allegation that the firm of Donald Bethune & Co. were a limited partnership under the statute 12 Vic., ch. 75, of which Donald Bethune was the sole general partner, and the defendants

(with others) were special partners; that the plaintiff's causes of action accrued against the limited partnership and not otherwise: that the defendants are sued as partners in that limited partnership; that after the accruing of those causes of action the plaintiff sued Donald Bethune as the general partner, and recovered judgment for the same, which judgment is still in force.

The replication is the same as that to the ninth plea.

Under the statute referred to there is no doubt I think that an action is not maintainable against a special partner *as such* of any limited copartnership. In certain cases provided for by the act he is made liable; as in sec. 7, if any false statement be made in the certificate required by the act, all the persons interested in the partnership are made liable for all the engagements thereof as general partners. By sec. 8, a default in filing a certificate of a renewal or continuance of a limited partnership beyond the time originally agreed upon, has a similar effect. So by sec. 9, certain alterations in the limited partnership, operate to resolve it into a general partnership, unless *renewed* as a special partnership under the 8th sec.; and by sec. 10, the use of the name of a special partner in the firm with his privity makes him a general partner.

Two questions then present themselves—1st. Is enough stated in the replication to convert the defendants' liability as special partners into that of general partners, if the fact that they were originally special partners is to be taken as conceded by the replication; and if that is denied, or if being admitted, enough is shewn to make defendants liable as general partners, then whether the effect of the recovery against Donald Bethune is avoided by the facts stated.

As to the first question, it appears to me that if the plaintiff meant to admit that the defendants were in the first instance only special partners, but became liable to be treated as general partners by reason of matter subsequent; that the particular cause on which the plaintiff relies should have been set forth, and that it is not enough for his purpose to say that the defendants were falsely registered as special partners. If the certificate registered contained a false state-

ment where the defendants, instead of being special became by force of the 7th section general partners, the false statement relied upon should be pleaded. But I rather understand the replication to mean that the defendants were *ab initio* general partners; that the assertion that they were special partners was a false pretence, by which the plaintiff was misled, and did not subsequently include them in the action against Donald Bethune. If so, the only enquiry is, whether this deception will operate to prevent the merger of the original cause of action; but this is only the same question as has been already discussed on the replications to the 9th plea. I cannot distinguish the case, so put from that of an unknown or dormant partner, who having been asked whether he was or was not a partner in a firm, has explicitly though untruly denied it. The plaintiff evidently dealt with the firm of D. Bethune & Co. as a limited partnership, of which the sole general partner was Donald Bethune. I see no difference in substance between a general partner falsely representing himself to be a special partner, and an ordinary partner, whose name did not appear, denying that he was connected with the firm; and I have met with no authority which leads me to conclude that in such a case a recovery against the known partners would not as to the unknown or dormant partner operate as a merger at law, or which shews that the plaintiff in such a case could obtain an injunction in equity to prevent his pleading such a defence. (See 4 Johnson N. York rep. chan. 566 per Kent C.)

The 11th plea raises the common law defence, that by a recovery against one joint contractor the remedy against a co-contractor on the same cause of action is barred. The replication is the same as to the 10th plea, and if it be insufficient as to that, it cannot be good as to this plea.

It is unnecessary to repeat the reason why I consider it cannot be sustained.

I think that a demurrer is a proper mode of testing the sufficiency of a pleading on equitable grounds. Several of the cases in England shew that this course has been adopted.

Looking at the question raised, as to its general consequence if the plaintiff is right, the *argumentum ab inconveni-*

ente suggests itself. For no matter how many persons may have intended to become special partners, if there be a false statement in the certificate registered, they would all be liable as general partners; and then, after a recovery against the general partner, the plaintiff, alleging that he did not know of such falsehood until after that recovery, might bring an action against each, for I do not see that a plea in abatement that *some* of the co-contractors were not joined would be maintainable, and all the co-contractors could not be joined, as against those who were general partners the cause of action would certainly be merged. The liability must therefore be joint and several, and then there might be as many actions on a contract originally joint, as there were special partners following the recovery of judgment against the general partners.

On the whole, I am of opinion our judgment should be for the defendants.

We do not wish to be understood as intimating an opinion that the plaintiff is without remedy, or that a person claiming the protection of the limited partnership act may not by a course of dealing—as for example by actively inducing a creditor to abstain from suing him as a general partner, by falsely representing himself to be simply a special partner, when in truth he was generally liable, render himself liable before the proper tribunal, notwithstanding a recovery of judgment against the general partners.

See *Woodhouse et al. v. Farebrother* 5 E. & B. 277; *Ex parte Higgins* p. 47, *Law Times* of this year; *Sloper v. Cottrell* 6 E. & B. 497; *Brandon v. Scott* 3 Jur. N. S. 362.

HENRY V. COOK.

Replevin—Delivery.

The plaintiff entered into an agreement with one McGowan for the purchase of a quantity of timber upon certain terms. The plaintiff failed in payment of the price agreed upon. McGowan afterward (the money being tendered) refused it, and did not deliver the timber, but sold and delivered it to one Cook. Upon replevin brought, *Held*, that no delivery having been made to plaintiff—he could not succeed.

Avowry. For that the defendant on the eighth day of August, in the year of our Lord one thousand eight hundred and fifty-

seven, at the mouth of the river Moira in the town of Belleville, in the county of Hastings, took the goods and chattels of the plaintiff, twenty thousand and five hundred feet of elm timber, marked with the letters J. M., and unjustly detained the same against sureties and pledges, &c.

Pleas—Not guilty and not possessed.

Defendant contended—

1. That the vidence shewed no right of action in this cause in the plaintiff.

2. That plaintiff had no right to replevy the property in question, and that replevin for the goods in question could be maintained by the plaintiff.

3. That plaintiff when he made the replevin had no property in the goods in question, nor had he any right to the possession as against the defendant.

4. That the evidence shewed the defendant had a complete defence thereon to this action and was entitled to recover.

5. That defendant having possession claimed the goods, plaintiff should have shewn a tender and demand of possession from him, which he did not.

The evidence taken shewed that on the 1st of August, 1857, a paper, of which the following is a copy, was signed by plaintiff and one John McGowan: "Bargain between John McGowan and William Henry; 556 pieces of elm agreed to be taken at 20,500 feet at 9d per foot. If less number of pieces a corresponding deduction to be made at 9d. per foot. If more pieces, the surplus to be paid for at 9d. per foot, to be counted in Belleville *before delivered*, and payable in cash on delivery, to be ready for delivery during next week, the clearances to be obtained from Mr. Way by Wednesday next." On the Wednesday or Thursday of the week, £200 was tendered to McGowan on account, but he refused to receive it unless he got the whole; he wanted to get all the money in one sum before the timber was delivered. Mr. Way was the agent of the commissioner of crown lands, and without his certificate respecting the payment of, or non-liability to, crown dues, a specification of the quantities of the timber could not be obtained at Quebec, and to get this certificate would require an affidavit from

McGowan, who therefore must apply for it. The defendant admitted that he had purchased this same timber from McGowan; McGowan had left word with Mr. Walbridge, in whose office the memorandum of agreement was drawn, that he would attend on a day he named at three o'clock, p.m., to receive the money from plaintiff, and he did attend and wait till past the hour, but the plaintiff did not come, but Mr. Walbridge did not know whether this was within the week or after it. After this, on Saturday, August 8th, the plaintiff got a party to advance him £500, part of the necessary funds to pay McGowan, on an agreement between plaintiff and the lender of the money, that a transfer of the timber should be made direct from McGowan to the lender, to secure him for the advance to plaintiff, and Mr. Bell attended with the money (£775 as he thought,) on the part of the lender to see that he should be secured. About four o'clock, p.m., of that Saturday, Mr. Bell and the plaintiff met McGowan in the streets in Belleville, and Mr. Bell told him he came to tender to him the price of the timber on plaintiff's behalf. McGowan replied, "I will have nothing to do with Henry, he has humbugged me long enough and has not paid me, and I have sold to Cook." Mr. Bell understood the plaintiff's object was to get the timber delivered; that the tender was necessary before the timber would be delivered. On the defence a receipt, dated 8th of August, 1857, from McGowan to defendant, was proved for £785, as the price of this timber. And Mr. Way's certificate, dated 6th August, 1857, that the timber was cleared at his office; and the evidence of John McGowan, taken on a commission, was put in, subject to all just exceptions to it as evidence in the cause, but not as the evidence being properly taken, inasmuch as it was taken by consent. He confirmed the making of the bargain already put in, and stated that plaintiff agreed to pay him for the timber on the Wednesday or Thursday after the bargain was made at Mr. Walbridge's office, in Belleville; that he went to that office on the Wednesday, but plaintiff was not there, and then went to plaintiff's house, and told him that he would not keep the timber any longer than the next evening, as agreed upon. That

the next day he went again to Mr. Walbridge's office, and was there offered the sum of £200 on behalf of plaintiff, in part payment, and to bind the bargain; and was told that plaintiff could not pay the balance for a few days, which he refused to accept. In the evening of the same day he saw plaintiff, who urged him to accept the £200, and wait for the balance until he, plaintiff, could go to Quebec and return; that he again refused, and told plaintiff that he would wait no longer, and their bargain was at an end. That in the forenoon of the following Saturday he sold the timber to the defendant, was paid by him, and delivered the timber to him. After this, on the same day, he saw plaintiff, and told him he might still have the timber. McGowan believing, as he swears, that plaintiff could not pay for it. Plaintiff requested McGowan to meet him at Mr. Walbridge's office at 3 o'clock the same day, and he would pay for the timber. That he (McGowan) did attend, but plaintiff did not. That he told defendant, before selling to him, of his bargain with plaintiff, and that it was broken up on account of plaintiff's default. The proposal made by McGowan to plaintiff on the Saturday to accept payment, at Mr. Walbridge's office, was made, as Mr. McGowan swore, without the defendant's knowledge or consent.

It was then agreed that a verdict should pass for plaintiff, by consent, for 25s., subject to the opinion of the court, who were to consider the evidence, with power to draw inferences of fact as a jury might do, and might order a verdict to be entered for the defendant; and that the case should be heard as a special case.

In Easter Term the case was argued by *Walbridge*, Q. C., for plaintiff, and *Bell* of Belleville, for defendant.

DRAPER, C. J., delivered the judgment of the court.

I look upon the agreement of the 1st of August, 1857, to be nothing more than a contract for sale; that by its terms the plaintiff was only entitled to have the timber on paying for it, and that the delivery (payment being made) was to take place during the ensuing week; and that the necessary clearance from the government agent should take place by the Wednesday following the making of the contract.

Then as to the facts, McGowan did obtain the clearance, but not until the 6th of August, the Thursday after the contract was made. That plaintiff tendered £200 on that day, asking for time to pay the residue, which was refused, and the plaintiff was notified by McGowan that unless the money was paid at once he would consider the bargain at an end, and as the plaintiff did not pay it McGowan sold and delivered the timber to defendant, but afterwards, meeting plaintiff, told him that he would attend at 3 o'clock at Mr. Walbridge's office on that day (Saturday) and receive the money, though McGowan appears not to have expected plaintiff could pay the money, and therefore can hardly have been sincere in his offer. He did, however, attend, waited some time, and left Mr. Walbridge's office, to which the plaintiff did not come. But about four o'clock Mr. Bell and plaintiff met McGowan near the bridge in Belleville, and tendered the money, which McGowan refused, as he said it was too late.

The plaintiff, by bringing replevin, asserts that the timber in question was actually his, delivered to him in fact, or at least as the legal consequence of the facts.

In *Henderson v. Sills*, decided this term, I made some observations on the law of replevin, which I need not do more than refer to; but without resting on any thing there stated, it appears to me clear that there was never a delivery of the timber in this case, and therefore, that the plaintiff fails.

It certainly did not pass by the contract, and not only has there been no delivery since, but there has, on the contrary, been a refusal to deliver, and a sale and delivery to another. I think it would be impossible for McGowan under the existing circumstances, to bring an action for goods sold and delivered, and yet if he could not, I do not see how this action can be maintained.

In my opinion the defendant is entitled to the *postea*.

McINNES V. STINSON.

Replevin—Distress—Tenancy.

Where a tenant, after the determination of a lease for a specific term, continued to hold possession for five months, paying by agreement £75 for the first three, and the same amount for the last two months, and afterwards occupied without any specific agreement.

Held, that no definite tenancy was created by the last overholding.

REPLEVIN. The defendant avows for rent for three months, ending 1st January, 1855, as tenant of a certain warehouse, held by plaintiff, at a yearly rent of £300, payable quarterly on the 1st January, April, July and October, in each year, by equal payments of £75 each.

Plea.—Non-tenuit.

The trial took place in April last, at Hamilton, before *McLean, J.* It was admitted that an account was rendered by defendants to plaintiff, claiming £75 for a quarter's rent up to 1st January, 1858; to which plaintiff replied on the 18th January, 1858, that in reference to the amount due for the occupation of defendant's premises in King-street, plaintiff prefers that the adjustment of the account should be left until the plaintiff should move into the new building: that not being able to tell the exact day he would move, plaintiff cannot arrive at the exact amount.

It was proved that the account for rent was left on the 2nd January, with plaintiff's bookkeeper, who, on application some days after, said he could not pay, the cashier was not within. The plaintiff had a lease from defendant of the premises for a year, from 1st May, 1856, under which the rent was payable quarterly on 1st August, November, February and May. At the expiration of that year, plaintiff wished to have the premises for a specific time, which defendant refused, but afterwards an arrangement was made for plaintiff to occupy the premises for five months, paying £75 for the quarter from 1st May to 1st August, and on the 1st October a further sum of £75 for the last two months' occupation. The plaintiff continued to occupy until 1st March, 1858, and, so far as appeared, without any lease or new arrangement. For the defendant it was urged that the plaintiff's occupation must still be considered as subject to an agree-

ment to hold for £75 per quarter, for which defendants might distrain. The learned judge thought not; and by agreement of parties a verdict was taken for plaintiff, with leave to defendants to move to enter a verdict for them, if the opinion of the court should be in their favour on the facts stated.

In Easter Term *D. B. Read* obtained a rule *nisi* accordingly. *Burton* shewed cause. He cited *Bishop v. Howard*, 2 B. & C. 100.

D. B. Read said the understanding was that it should be left to the court to say if a new tenancy was not shewn by the evidence generally of what had happened since the expiration of the year's tenancy, and contended that the evidence, respecting the rendering the account for rent and the plaintiff's letter of the 18th June, 1858, shewed a holding from year to year, commencing with the expiration of the last payment of rent, 1st October, 1857. He cited *Berry v. Lindley*, 3 M. & Gr. 510; *Doe v. Lines*, 11 Q. B. 402.

Burton insisted that the sole question reserved was whether the overholding after the five months was evidence of a new tenancy from year to year.

DRAPER, C. J., delivered the judgment of the court.

I do not see any ground on which this avowry can be sustained. If the evidence established a tenancy from year to year, when does that tenancy commence? For the year ending 1st May, 1857, the plaintiff was tenant under a lease. If, when that year expired, he had held over without any new agreement, and paid a quarter's rent, he would have become tenant from year to year on the terms of the lease, from the 1st May, 1857. But instead of that an entirely new agreement was entered into, for a fixed term of five months, and at a specified rent: £75 for the first three months, and £75 for the last two, ending 1st October, 1857. No part of this holding could be said to be under the lease expiring 1st May, 1857. Plaintiff holds over after the 1st October without any new agreement; and he has not paid any rent. What is there to shew him to be more than a mere overholding

tenant? The plaintiff, to justify a distress, must shew an actual demise, or at least a contract for one at a specific rent. What is the rent agreed upon? How is it to be inferred from the former dealings? Is it to be £75 for each three months, or £75 for each two months, or £150 for each five months? for rents varying in this manner have been paid in fact by agreement between the parties. It has been held that if a party enters, and either pays or promises to pay a fixed rent, or even settles it in account, an agreement may be presumed which will give the landlord authority to distrain. But there has been neither payment nor promise of payment proved since the 1st October, 1857. The letter of the 18th January, and the statement of the leaving the account, and the answer given to the demand for rent pursuant to that account, furnish evidence that the plaintiff acknowledged his liability to pay the defendant rent, but no term is fixed; on the contrary, it is expressly stated to be indefinite, and that is made the excuse for not making an adjustment of the account, and no reference is made as to whether the rent is to be paid according to the lease for a year, or the last agreement for five months. In *Cox v. Bent*, where the landlord rendered an account, in which the first item was for rent £250 for a half-year's rent, the tenant said it was £25 too much, and it was reduced accordingly to £225, this was held to be an admission equivalent to the payment of the half-year's rent at £450 per annum, and shewed that the plaintiff in that cause had become tenant from year to year. The present case differs materially, and the language of the plaintiff in the letter of the 18th January is inconsistent with the idea of any tenancy, except for a broken period; it certainly admits no more.

In any point of view, therefore, I am of opinion this rule should be discharged.

The Chief Justice referred to the following cases:—*Regnart v. Porter*, 7 Bing. 451; *Krysht v. Burnett* 3 Bing. 36; *Cox v. Burt*, 5 Bing. 185.

RENALD V. WALKER.

Storage—Lien.

SPECIAL CASE.

Held, that a warehouseman has only a lien on the property stored for the storage of grain in his warehouse, and not for the general charges thereon. Holcomb & Henderson stored a quantity of wheat in the defendant's warehouse at "K," and for the charges incurred thereon, gave them a draft on their own firm in "M.," which the defendants accepted in payment and receipted the bill. The draft was presented and accepted, but during its currency H. & H. failed. The defendants then refused to give up the remainder of the wheat, (having already shipped a large portion of it to Montreal,) claiming a lien for their general charges.

Held, that their legal lien was suspended during the currency of the bill.

This was an action brought to recover the sum of £213 11s. 5d. for money received by the defendants for the plaintiffs. The defendants pleaded, never indebted.

The case was tried before *Draper*, C. J., at the last spring assizes at Kingston, when a verdict was found for the plaintiffs for £200 damages, subject to the opinion of the court on the following case :

CASE.

The defendants carry on business in Kingston, and are wharfingers and warehousemen, having elevators and premises for elevating, shovelling, storing and spouting grain. The plaintiffs are dealers in flour and grain at Montreal, and owned a cargo of wheat brought by the "Kentucky," from Chicago, state of Illinois, to Kingston, and delivered to the firm of Holcomb & Henderson, forwarders and common carriers at Kingston, to be trans-shipped by them at Kingston, and forwarded to Montreal. The cargo amounted to 12,007 $\frac{4}{8}$ bushels, and was elevated, shovelled and stored by them on account of Holcomb & Henderson, on the 22nd of September, 1857; on the same day 2,000 bushels were spouted and delivered by the defendants to Holcomb & Henderson per the barque "Cleveland," and on the 22nd of October, 1857, 6,930 bushels were spouted and delivered per barge "Cleveland;" remainder of the cargo, 3077 $\frac{4}{8}$ bushels, remained in store till the 23rd day of October 1857. The unpaid charges for storing and spouting this cargo amounted to £53 17s. 8d., of which the sum of £34 13s. was in respect of the 6,930 bushels, and £19 4s. 8d.

the 3077 $\frac{4}{6}$ bushels. Messrs J. Buchanan, Harris, & Co., of Montreal, owned another cargo of wheat received by the defendants under precisely similar circumstances, 1,969 bushels of which remained stored by them till the 23rd October, 1857. The defendants' charges upon this cargo of wheat amounted to £58 11s. And, except the sum of £9 16s. 8d., are included in the receipted account, and draft hereinafter mentioned.

On the 13th of October, 1857, the defendants rendered their account against Holcomb & Henderson for £149 8s. 7d., for which they took a draft of Holcomb & Henderson, of Kingston, on Holcomb & Henderson, of Montreal, at ten days date, for £149 16s. 1d., which draft, though accepted, has not been paid, but did not become due till the 25th of October, 1857. The defendants receipted the account when they received the bill of exchange.

On the 15th day of October, and after the draft was accepted, Holcomb & Henderson and Henderson & Holcomb (same parties) failed, and gave notice of their inability to meet their engagements. The defendants refused to deliver the wheat to the owners until payment of the amount of Holcomb and Hendersons' general indebtedness for elevating, shovelling, storing, and spouting grain, being the sum of £213 11s. 5d., in which is included the said sum of £149 16s. 1d., alleging that the names of the owner in the transaction with Holcomb & Henderson were not disclosed to the defendant. Holcomb & Henderson took receipts for the wheat delivered to the defendants in their own names.

Plaintiffs paid the whole demand under protest, and received the balances of the cargoes belonging to themselves and Messrs J. Buchanan, Harris, & Co., on the 23rd of October last.

The question for the opinion of the court was, had the defendants a lien on the balances of the said charges for £213 11s. 5d., as against the owners thereof?

S. Richards, for plaintiffs, cited *Smith v. Barclay*, 3 B. & P. 219; *Crawshay v. Homfray*, 4 B. & Al. 50; *McCombie v. Davies*, 7 East 6; *Henison v. Guthrie*, 2 Bing. N. C. 755.

Philpotts, for defendants, cited *Hefford v. Algen*, 1 Taunt. 218; *Bowman v. Malcolm*, 11 M. & W., 833; *Scarf v. Morgan*, 4 M. & W. 278; *Grenville v. Bleth*, 16 Ves. 230; *Hancock v. Caffyn*, 1 M. & S. 535; *Davies v. Lowndes*, 3 C. B. 830.

DRAPER, C. J.—In *Holderness v. Collinson* (7 B. & C. 216), *Bayley, J.*, thus states the law: “The onus of making out a right of general lien lies upon the wharfinger. There may be a usage in one place varying from that which prevails in another. Where the usage is general and prevails to such an extent that a party contracting with a wharfinger must be supposed cognizant of it, then he will be bound by the general terms of that usage * * * In that particular case the claim was not for wharfage only, but for labourage and warehouse rent.” As to that the learned judge observes, “An attempt has been made to draw a distinction between the claim for labourage and warehouse rent, but the right to either arises out of an express or implied contract, and the case states that the claim to both these items is a point in dispute at Hull. In the face of such a statement it is impossible to infer that the bankrupt landed his goods at the defendants’ wharf upon the terms of giving a general lien in respect of these demands.”

This case before us rather assumes the lien for wharfage, &c., of the particular goods. The observations tend to shew that to establish such a claim, evidence of custom at the particular port should have been given. But *a fortiori* with regard to general liens as to which *Jervis, C. J.*, remarks in *Dixon v. Shavesfield* (10 C. B. 459), the man is not entitled to a lien simply because he happens to fill a character which gives him such a right, unless he has received the goods or done the act in the particular character to which the right attaches. There is no evidence of usage or course of dealing between the parties to justify the claim of a general lien.

Assuming that there was a general lien for wharfage by express or implied contract, I gather that other charges are included, as to which certainly there is no ground for issuing any lien. If parties set up claims of this description

they should be prepared to shew by evidence the grounds on which they are rested, but the case gives us no information in this respect..

The defendant, however, seems to me to have lost his claim of lien, if he ever had it, at the time when the plaintiffs paid the money in order to get their wheat, for they had received Henderson & Holcomb's bill for the balance due them, and that bill had not been dishonoured when this payment took place. This brings the case within the decision of Lord *Eldon* in *Cowell v. Simpson* (16 Ves. 275), and is the ground of distinction relied on by Lord *Ellenborough* in *Stevenson v. Blacklock* (1 M. & S. 535).

I think plaintiffs are entitled to judgment.

HAGARTY, J.—1st. I am of opinion that the facts in the case before us will not support the claim for the lien for general balance. If the lien is claimed as wharfingers, the claim alleged for “elevating, shovelling, storing and spouting,” does not seem to me as in the language of *Dixon v. Stansfeld* (10 C. B. 418), as done in the particular character to which the right attaches. *Bowman v. Malcolm* (11 M. & W. 833), *Parke, B.*, (speaking of general lien) says, “It does not appear that any part of his claim is for wharfage. As a shipping agent or warehouse keeper he could have no general lien except by contract.”

2nd. I consider the taking of a note or bill payable at a future day, for the charges, was an abandonment of the lien, and that at all events at any time before dishonor of the bill the plaintiff had a clear right to possession of the goods.—*Horncastle v. Farran* (3 B. & Ald. 489), *Bunney v. Poyntz* (4 B. & Ad., 568), *Valpy v. Oakley* 16 Q. B. 941),

Miles v. Gorton (2 Cr. & M. 504), *Crawshay v. Homfray*, (4 B. & A. 50). The alleged insolvency of H. & H. on the 15th of October, while the bill was current, cannot, I think, in this case revive the lien or bring it within the dictum of *Bayley, B.*, in the last case cited. “While the bill was running, or at all events until something occurred to shew the vendee to be in a complete state of insolvency, the vendee has a right to exercise a control over the whole,

and if he had sold the whole, I think he might have insisted that the whole should be delivered to the purchaser."

In the present case, after the 15th of October, when it is said H. & H. failed, and while the bill was still current, viz., on the 22nd of October, upwards of 1000 bushels were shipped by the defendants by the barge "Cleveland."

Judgment for plaintiff.

NEWMAN V. KISSOCK.

Promissory note—Pleading—Common Law Procedure Act, 1856.

A declaration stating that defendant falsely, deceitfully, fraudulently, and wilfully represented the maker and endorser (without naming them) of a promissory note to be good.

Held bad, on demurrer, for want of sufficient certainty.

DECLARATION.—That the defendant by falsely, deceitfully fraudulently, and wilfully representing the maker and endorser of a certain promissory note to be solvent persons, able to pay the amount of the said note, sold the note to the plaintiff, yet the makers and endorsers of the said note were not, nor were, nor was any or either of them solvent persons, able to pay the amount of the said note.

Demurrer.—That the note above referred to is not sufficiently defined, or who the maker or endorsers were, and that no damage was shewn.

D. B. Read, for demurrer, referred to 7 Ed. Chitty on Pleading, 2nd vol., page 523, and *Pewtress v. Austin*, 2 Marshall, 217.

M. C. Cameron, contra.

DRAPER, C. J., delivered the judgment of the court.

I think the second count in the declaration is bad for want of sufficient certainty in the statement regarding the makers and endorsers of the note concerning whom the alleged false and fraudulent representation is charged to be made. Mr. Cameron likened it to the form given in schedule B., of the Common Law Procedure Act, on an action for breach of warranty of a horse. "That the defendant, by warranting a horse to be then sound and quiet to ride, sold the said horse to the plaintiff, yet the said horse was not then sound and

quiet to ride." But I do not think the cases are analogous. It would have been more to the point to have followed the substance of the forms in that schedule relating to promissory notes. The substance of the complaint is a fraudulent representation of the solvency of the maker and endorser of a promissory note. Suppose the action had been for falsely representing a third person as fit to be trusted, and consequently, that the plaintiff, relying on the representation, sold him goods, it can scarce be pretended that a declaration would be good which only stated that the defendant falsely, &c., represented a certain person to be solvent, &c., and that plaintiff trusted the said person and let him have goods on credit, and that he was not solvent, &c. It must not be left to the defendant to guess who the "certain person" is. The Common Law Procedure Act has gone a great way to prevent prolixity in pleading, and to save unnecessary statements. I should be exceedingly sorry not to give it the fullest effect, but the substance must nevertheless be plainly expressed. Here the substance is a deceitful and fraudulent representation respecting particular parties, and I feel no doubt it should be stated who the parties were.

As to the general question that was discussed, that if a man tells an untruth, knowing it to be such, to induce another to alter his condition, who does accordingly alter it, and thereby sustains damage, he is liable to the party injured, though he intended no fraud or injury in making the false representation. I refer to *Watson v. Poulson*, 15 Jur. 1111, *Polhill v. Walter*, 3 B. & Ad. 114, which is cited in that case, and to *Pewtress v. Austin*, 6 Taunt. 522.

I think judgment should be for the defendant on this demurrer.

HENDERSON V. McLEAN.

Trespass—Crown lands.

Held, that a purchaser from the crown who held only a receipt for a portion of the purchase money, without a license of occupation under the 6th section of 16 Vic., ch. 159, cannot maintain trespass against a wrongdoer in respect of such land. *Held* also, that to maintain trespass by reason of possession (under such receipt) it must be actual and continuous.

TRESPASS to lots No. 20, 5th concesssion, and No. 19, 4th

concession of Sombra, and cutting down and carrying away the timber and trees of the plaintiff there growing. *Plea*, that the lands were not the lands of the plaintiff, and not guilty.

At the trial at Sarnia, before the Chief Justice of Upper Canada, in May, 1858, the defendant was clearly proved to have trespassed, and cut timber upon lot number nineteen ; the only question that arose was whether the plaintiff was entitled to succeed on the issue that the lands were his. As to this, it appeared that on the 1st October, 1853, the plaintiff paid a first instalment of £7 15s. and the inspection fee to the authorised agent of the commissioner of crown lands on the purchase of this lot, No. 19. The sale was subject, among other things, to the following condition : that no timber was to be used excepting for the improvements thereof without first arranging for that purpose, or paying up the whole of the purchase money, of which an instalment of one-tenth would fall due on the 1st January in each year, with interest. On the 23rd September, 1854, the plaintiff paid a second instalment with interest, on the purchase of this lot. The plaintiff employed an agent to look after this lot among others, and he in February or March, 1855, went upon this lot, and finding a large quantity of timber had been removed from it, employed one Johnson to look after trespassers. One line of this lot was run out in 1855 ; and in March last Johnson found that some timber had been cut and removed, and some was cut and still lying on the lot, which he marked on behalf of plaintiff. It appeared by a letter from the commissioner of crown lands, dated 28th April, 1858, that the plaintiff was still treated in that department as purchaser of this lot. The defendant put in a receipt from the crown timber agent to a partner of his for \$66, being the government duties on 66 pieces of timber, 57 of which were cut on this lot No. 19. It did not appear, nor was it in fact pretended that this timber was cut by authority of the commissioner of crown lands, but it was proved to be the course of dealing and business, that the government agent collected the timber dues upon all timber cut upon unpatented crown lands, and if, as in this case, the lot had been sold, the

amount received was credited to the purchaser on his unpaid purchase money. It was particularly explained that these dues did not represent the *value* of the timber. The defendant was aware of the plaintiff's interest in this lot, and said he intended to make use of this receipt in case Mr. Henderson claimed. The jury, under the direction of the learned Chief Justice, found for the plaintiff, leave being reserved to the defendant to move to enter a nonsuit on the ground that the evidence did not entitle plaintiff to succeed upon the second plea.

A. Prince, in Easter Term, moved accordingly, or for a new trial on the law and evidence.

Galt shewed cause. He argued that as against a wrong-doer the plaintiff showed himself sufficiently entitled to the land, and in legal possession of it to maintain trespass, he referred to *Glover v. Walker*, 5 C. P. U. C. 478.

A. Prince contra, contended, that admitting that the plaintiff, had actually occupied the land, he might have maintained trespass, and that as a purchaser paying his instalments he might take possession still; the plaintiff had not sufficiently taken possession, or if he had he had not continued it, and had lost any benefit from it, by not having paid any instalment since September, 1854.

DRAPER, C. J., delivered the judgment of the court.

Since the statute 16 Vic., ch. 159, was passed, we cannot hold that the receipt from the commissioner of crown lands will give to the purchaser of a lot the power to maintain suits in law or equity against any wrongful trespasser as effectually as if the patent deed had issued; for besides the repeal of 4 & 5 Vic., ch. 100, and 12 Vic., ch. 31, the 6th section of the first mentioned act authorises the commissioner of crown lands to issue under his hand and seal, an instrument in the form of a license of occupation, which enables the person therein mentioned to maintain actions or suits at law or in equity against any wrong-doer or trespasser as effectually as if he might do under a patent from the crown; and enacts that the license of occupation shall be *primâ facie* evidence, of possession, for the purpose of any such action or suit.

The plaintiff in this case proves no such license of occupation of which he could take advantage, and unless the evidence he gives will enable him to succeed at common law, this rule must be made absolute, for looking at the course of legislation, and according to the case of *Glover v. Walker* (5 C. P. U. C. 578,) that unless as against the crown, the purchaser of a lot of land under such circumstances as the plaintiff, may enter into actual possession, and then may maintain trespass against a wrong-doer, still there is no authority for holding that such a receipt will of itself confer constructive possession.

But the plaintiff's evidence goes far enough to shew an entry upon the lot itself in 1855, and also an entry again after the timber, the more immediate subject of the action, was cut, and the principal part of it removed, and if this would be sufficient to maintain trespass, the plaintiff is right. But I apprehend that in the absence of title there must be a possession in fact, upon which the wrong-doer trespasses. The first entry could not enure as a continuous possession, for though at the moment it gave the plaintiff possession in fact, he quitted possession, and did not re-enter until after the trespass now complained of was committed.

Indeed, it may be questioned whether, supposing that the plaintiff might be treated as an intruder by the Queen, as seems admitted in *Glover v. Walker*, the plaintiff, though in actual possession, could maintain trespass even against a wrong-doer. In *Plowden* 546 it is said, if the king is seised in fee of land, and a stranger enters claiming it as his own, and continues in possession a year and a day, and another does trespass upon the land, the stranger shall not punish such trespasser in an action of trespass, for if he should punish him then the trespasser should be doubly punished, for the king would also punish him, and *an intruder cannot gain such possession against the king upon which he may have an action of trespass.*

I certainly should be glad to sustain the verdict which is consistent with the moral justice of the case. But we cannot do so, unless we are prepared to hold that a purchaser from the crown under circumstances like those in this case acquires

such an estate as draws the possession to it, and thereby gives him a right to maintain an action against any one who trespasses upon it. We do not so hold, nor can we hold that the facts proved are sufficient to enable him to succeed; we therefore make the rule absolute for a nonsuit.

McKENNY v. ARNER.

Registry—Consideration.

Where the plaintiff and defendant each claimed under conveyances from the same grantor, both of which undoubtedly covered a portion of the same land,

Held, that priority of date in a registered title prevailed over priority of registration, the registered conveyance not being proved to be for a valuable consideration.

EJECTMENT for part of No. 54, township of Malden, described. Writ issued on the 5th of January, 1858. Defence for a part of the land mentioned in the writ, described by metes and bounds. The plaintiff's notice of claim was under a deed of bargain and sale to Lucy McKenny, from John Stockwell, who had a deed from Richard Lawrence, who had a deed from Joseph Wilson, who had a deed from Alexander Cowan and James Cowan, who claimed by descent from David Cowan, who derived title by conveyance from Samuel Culverson the grantee of the Crown. The defendant's notice of title was as grantee of John Arner, who derived title by descent from Jacob Arner, who was grantee of Richard Lawrence, named in the plaintiff's notice. The defendant also asserted title in himself by possession of twenty years of himself and those through whom he claimed.

The trial took place before the Chief Justice of Upper Canada, at Sandwich, in April, 1858. The plaintiff produced several title deeds, the execution of which was admitted, shewing a conveyance from the grantee of the Crown and various mesne conveyances till Richard Lawrence made a deed of fifty acres of this lot 54, to John Stockwell, and he, on the 1st of November, 1857, conveyed to the plaintiff Lucy, the wife of the plaintiff, Henry McKenny. The deed from Lawrence to Stockwell bore date the 15th of May, 1824, conveyed that part of lot No. 54, township of Malden,

containing 50 acres of land, commencing at the north-east angle of the third part of the lot opposite the lots Nos. 53, 54, 64 and 67, and nearly in contact, then south 10 chains 6½ links, then west to the edge of a certain marsh granted to Captain Caldwell's sons, then north-westerly along the limits of the said marsh to lot No. 53, and then east to the place of beginning. The deed to the plaintiff Lucy from Stockwell contained a similar description.

The deed from Lawrence to Stockwell was registered on the 9th of February, 1830, the title being previous to this conveyance a registered one.

On the defence was proved a deed from Richard Lawrence to William Fisher, dated the 28th of March, 1825, and registered on the 13th of April, 1825, conveying 100 acres composed of lot No. 54, in the Township of Malden, described thus: commencing at the north east angle of the said lot, with the exception of fifty acres already sold or deeded, the whole of the said lot having contained 150 acres, where the lots Nos. 53, 54, 64 and 67 are nearly in contact; then south 31 chains, 30 links; then west to the edge of a certain swamp granted to Captain Caldwell's sons; then north-westerly along the limit of said marsh to lot No. 53, and then east to the place of beginning. It was further proved that Stockwell went about thirty years before the trial to live upon the 50 acres purchased by him, and took possession of the easterly end of the lot as that which he purchased, claiming apparently the whole width of the lot, and as far south as would give him 50 acres, asserting that the description was wrong, and afterwards he took (7th of July, 1834) another deed from the heir at law of Richard Lawrence, in which the land is so described as to correct what Stockwell said was an error. At the same time there was no evidence of possession for twenty years of the westerly part of the lot, now claimed by the plaintiff, and apparently falling within the description of the deed of the 15th of May, 1824, by defendant or those under whom he claimed.

The learned Chief Justice directed the jury in effect that the deed under which the plaintiff claimed covered 50 acres of land along the northerly side of the lot of a depth of 10

chains, 65 links. That the deed from Lawrence to Fisher, though prior to the deed to Stockwell in registry, was subsequent in date and execution, and contained an express exception of the 50 acres already sold, or deeded, an exception plainly referring to the deed to Stockwell, which exception must be taken to apply to the fifty acres therein described, and that the plaintiffs would therefore be entitled to recover the land covered by that description, unless some person or persons had held visible exclusive possession of some part of the land in question without a written acknowledgement of Stockwell's title or payment of rent to him. If there had been such possession, it would bar the plaintiff's right of recovery as to the land so possessed, and the learned Chief Justice intimated his opinion against the sufficiency of the evidence to sustain that defence. The jury found for the plaintiff.

In Easter Term, *A. Prince* obtained a rule *nisi* for a new trial on the law and evidence, and for misdirection, contending that the second deed (that to Fisher) being first registered, the deed to Stockwell became under the registry acts fraudulent, and as far as respected lands which fall within the description of the two deeds. That the deed to Fisher was *primâ facie* proved to be for valuable consideration, by the acknowledgement therein contained, on the part of Lawrence the bargainor, of the receipt of the purchase money. That the reference to 50 acres already conveyed, though in form an exception, was only made to determine the point at which the description should commence, and that therefore the deed to Stockwell described the land for the recovery of which this action is brought, yet the deed to Fisher also covered the portion defended for, and being first registered, must prevail, independently of any question of possession.

O'Connor shewed cause. He cited *Doe Hill v. Gander*, 1 U. C. Q. B. 3; *Doe Becket v. Nightingale*, 5 U. C. Q. B. 518; *Ferrier v. Moodie*, 12 U. C. Q. B. 379; *Wield v. Scott*, *ib.* 537, as to possession, and to proof of being a purchaser for valuable consideration, *Doe Cronk et al. v. Smith*, 7 U. C. Q. B. 376.

DRAPER, C. J., delivered the judgment of the court.

The description in the deed to Stockwell unquestionably covers the portion of land which the plaintiff seeks to recover. Before we enquire into the application of the registry acts to the matter in dispute, it must be clear that the descriptions in the two deeds cover a portion of the same land. That to Stockwell commences at the north-east angle of the third part of the lot No. 54, opposite the lots 53, 54, 64 and 67, and nearly in contact. This is somewhat confusedly expressed, as the north-east angle of 54 cannot be said to be opposite lot 54. But the principal point is clear, the north-east angle of that lot, and the residue of the description if repugnant might be rejected. The description in the deed to Fisher reads thus, "commencing at the north-east angle of lot No. 54, with the exception of 50 acres already sold or deeded. The whole of the said lot having contained 150 acres, more or less, where the lots No. 53, 54, 64 and 67 are nearly in contact." But for the exception of the 50 acres, the two deeds would, I think, designate the same point of commencement of the description. The question then is, what is the north-east angle of the lot excepting the 50 acres already sold. The point which will best fulfil that description must be found at the most northerly point on the easterly side of the lot not already sold; that is a point 10 chains and 65 links south of the north-east angle of the lot. If, however, this is taken as the starting point, the residue of the description is clearly erroneous. The first distance given 31' 30 links south, which is the whole estimated width of the lot. The description as given extends to lot No. 53, in the third course, and from thence going east, the course stated, the place of beginning would never be reached. The description in this deed can only be made consistent with itself by assuming the point of commencement to be on the northerly side of the lot, and at an assumed distance of 15 chains 98 links west of the north-east side; according to which the two descriptions certainly cover the same land in part. Taking this for the argument's sake to be the true point of commencement, as the defendant contends, then we must

see whether the defendant has proved enough to claim the protection of the registry law by avoiding the prior deed to Stockwell, in favour of the latter to Fisher, as having been, though last in date, the first on registry. Here, however, the defendant fails, for he has not proved valuable consideration, and the case of *Doe Cronk v. Smith* is a clear authority against Mr. *Prince's* argument that the acknowledgment of payment in the deed can avail.

Upon the point of possession there really was no evidence to leave to the jury. It has been repeatedly determined that the possession which is to prevail against the title must be a continuous actual possession, an occupation in fact, and we cannot depart from the rule because, in the present instance, its application may favour an unconscientious claim.

I have considered whether Stockdale's own declarations, and his conduct in obtaining the subsequent conveyance from the heir at law of Lawrence, afforded any substantial reason for holding these plaintiffs precluded from setting up this present claim. But I have been unable to satisfy myself that the defendant is in a position to urge such an argument, or that it would be really tenable. It was not even suggested by Mr. *Prince* that he could hope to prevail on any such ground.

On the whole, I am of opinion the direction to the jury was right, and that we have no alternative but to discharge this rule.

REID V. MCCHESENEY.

Principal—Agent.

McC. & Brother acting as agents for L. T. & P., purchased a load of coal, without stating to the vendor that they were acting as agents, and upon receipt of the coal, sent in payment a draft accepted by their principals in which they signed themselves "agts;" upon an action brought against them as principals,
Held, that they were liable as such.

The declaration was on a bill of exchange dated the 19th of October 1857, drawn by defendant McChesney on the firm of Latham, Tozer, & Perry (the defendant Tozer being one of the firm) in favour of plaintiff for \$1,251 24c. at 90

days from date, and accepted by the drawees. Pleas—denying drawing and acceptance of the bill.

The case was tried in May last at Toronto before *Richards, J.* The bill sued upon was admitted to bear the genuine signatures of drawers and acceptor as they appeared. It was as follows :

\$1251 24c.

Toronto, C. W., October 19, 1857.

Ninety days after date, pay to the order of C. M. Reed Esq., twelve hundred and fifty-one, twenty-four dollars, value received.

J. McCHESNEY & BROS., Agts. }
GEGGIE. }

To Messrs Latham, Tozer, & Perry, Oswego, N. Y."

Written across the face, "Accepted at Marine Bank Buffalo, Latham, Tozer and Perry."

James B. Geggie was called as a witness, and swore he was clerk of J. McChesney & Brother when this bill was signed. The firm was composed of John and James McChesney, but John has since died. The witness had a power of attorney from them to sign their names in business, drawing bills, &c. He told James McChesney he had signed this, and he made no objection, and that it was drawn to be sent to the plaintiff. McChesney & Brother were doing business in Toronto for Latham, Tozer, & Perry of Oswego. The business was carried on in the name of McChesney & Brother; they had their own sign up as McChesney & Bro., and issued their cards. The witness had been with them a year, during which they carried on business in that manner. A schooner had been sent up Lake Erie by McChesney & Brother with a letter addressed to a firm on the American side for a load of coal. They had no coal, but the captain of the schooner telegraphed that plaintiff had coal which he would ship if it was ordered, and the witness telegraphed in reply to ship it. On the arrival of the coal here Geggie wrote to Latham, Tozer, & Co., to send their acceptance for the amount to plaintiff. On the 5th of November, 1857, in consequence of a difference in the weight of the coal here, and that stated as the weight shipped, Geggie wrote to plaintiff acknowledging his letters of the 30th of October and 2nd of November, and stating that the coal had been carefully weighed here, and adding, "we

have accordingly made draft on Messrs Latham, Tozer, & Perry for amount of coal delivered as below."

" 330½ tons coal ex Grover \$3 75 per ton.....	\$1239 38
Advance made by you, to Captain ½ loading	11 86
Amount of draft on L. T. & P. to be sent you by -----	
by them, which we hope will be satisfactory	\$1251 24
Your friend, J. McCHESNEY & BRO. }	
GEGGIE." }	

Plaintiff wrote a letter dated the 2nd of November, above referred to, which concludes thus :

"You will please draw on Latham, Tozer, & Perry at 90 days from October 19th for the amount of above bill, payable at the Marine Bank Buffalo, and have them accept the draft and send the same forward to us."

This letter was addressed to Messrs J. McChesney & Bro., and began with a bill of parcels of the coal as sold to McChesney & Brother. Geggie further swore that he wrote "agts.," because McChesney & Co. were agents. He was not sure plaintiff knew they were agents for Latham, Tozer, & Perry; he (witness) thought he knew it; supposed the captain had explained it. As the other coal dealers knew it, he supposed plaintiff knew it. It appeared this was the first occasion on which plaintiff shipped coal to defendants, McChesney.

The learned judge was in the plaintiff's favour, but asked the jury to say whether plaintiff, at the time he sold the coal or took the bill of exchange for it, knew that McChesney & Brother were the agents of Latham, Tozer, & Co., in the purchase. The jury found this was so, and the learned judge directed a verdict for the plaintiff, for £318 16s. 9d., reserving leave to defendant McChesney to move to enter a verdict for him on that ground.

In Easter Term, *Bell* (of Toronto) obtained a rule *nisi* to enter a verdict for defendant McChesney on the leave reserved.

Crombie shewed cause. He cited *Boyd v. Cheney*, 5 C. P. U. C. 494; *Nicholls v. Diamond*, 9 Exch. 154; *Mere v. Charles*, 5 E. & Bl. 979; *Lindsay v. Melrose*, 3 Jur. N. S. 619; *Jenkins v. Hutchinson*, 13 Q. B., 152; *Cooke v. Wilson*, 2 Jur. N. S. 1094; *Story Agency*, 269; *Couen v. Wright*, 4 Jur. N. S. 357.

McMichael, contra, referred to *Owen v. Van Uster*, where the preceding cases are collected.

DRAPER, C. J., delivered the judgement of the court.

I think this is a very clear case for the plaintiff. The defendants McChesney & Brother are carrying on business in Toronto in their own name as a firm, selling goods and sending accounts in their own name. They send off a vessel to Erie in the State of Pennsylvania, with a letter addressed to some party there for a load of coal. That party has none, but the captain, by authority from McChesney, or rather from their duly authorised agent, obtains a load from the plaintiff. The account for the coal is rendered to McChesney & Brother as the purchasers. It is not shewn that the plaintiff was told that they were buying as agents for Latham, Tozer & Perry, or that he was apprised that the credit was to be given to that firm, or that they were in any way connected with the purchase. In the letter written by Geggie in the name of McChesney and brother on the 5th of Nov., 1857, he says nothing of the sort, and the first time that any thing is proved to be done which bears even the appearance of agency, is when the bill drawn by McChesney & Brother by Geggie, and accepted by Latham, Tozer & Co., is sent to plaintiff, and at the end of the signature of the drawers are the letters "agts.," meaning, we may assume, agents, but agents for whom, or how, is not there explained, and the plaintiff having their draft in his favour, and having sold the coal to them, which is the legitimate inference from the evidence, might well rest satisfied, that he had both drawers and acceptors liable to him. Even now there is no distinct statement to what extent or in what manner McChesney & Co. were agents for Latham, Tozer, & Perry. And whatever understanding may have existed between themselves, they appear to have acted here as persons conducting business on their own account.

Without referring to the fact that Geggie signs this bill for McChesney & Brother, under an authority strictly derived from them, I feel no doubt that the plaintiff has shewn a strong case that he dealt with them as principals, and there really is nothing in the defence to rebut it.

In addition to the cases cited, I refer to *Green v. Kopke*, 18 C. B. 549, which decides that where a contract in writing is entered into by one who describes himself as agent, and as making the contract as agent, and on behalf of his principal, naming him, the party so making the contract is not liable. This case appears to be almost the very converse.

I think the rule should be discharged.

MACDONELL V. FAREWELL.

Costs—Statute 18 Vic., ch. 69.

Where a rule to tax costs had been taken out, 26th February, 1856, under the provisions of 18 Vic., ch. 69, and served, and the bill demanded, afterwards, the plaintiff not producing his bill, the defendant, on the 28th February, 1856, taxed a nominal bill; on the 17th March, 1857, the plaintiff made up and delivered his bill, and demanded payment, which was refused. In Easter Term, 1857, relief was sought by application to set aside the taxation, and all subsequent proceedings, which was enlarged by consent of the parties, till Easter Term, 1858.

Held, that the plaintiff was entitled to succeed notwithstanding the delay. The statute being passed to confer extraordinary benefit upon persons coming within its provisions. The court will not recognise enlargements.

The plaintiff brought debt on a recognizance of bail to the limits; the defendants being bail for one Prosper A. Hurd, while the counties of York, Ontario, and Peel were united. After the separation of the county of Ontario, Prosper A. Hurd passed and re-passed to and from the county of Ontario and the united counties of York and Peel, whereupon the plaintiff brought this action and recovered a verdict. Before judgment was entered the 18 Vic., ch. 69, was passed, the 5th section of which providing for such a case, and continuing to such debtors the limits of the whole united counties, though the union is dissolved, provides that “where proceedings in law have been instituted before the passing of this act against any person, or his or her sureties, by reason of such person having travelled from one county to another county of the said union, or by reason of his or her having continued to reside in one county of the said union after any such dissolution or separation, such legal proceedings may be

continued and prosecuted until the payment by the defendant or defendants, of the plaintiff's costs of suit, as between attorney and client, and on such payment the proceedings shall be discontinued." This act received the royal assent on 3rd April, 1855, and on the 26th June, 1855, a rule was made in this cause, on the application of the defendant's counsel, that the plaintiff should deliver to the defendant his bill of costs in this cause, as between attorney and client, that the same may be taxed by the proper officer of this court, and upon payment thereof by the defendants, it is ordered that the said cause be discontinued. A copy of this rule was served on the plaintiff's attorney about the 26th February, 1856. It is not shewn whether any appointment to attend the master to tax costs was served; but on the 28th February, the defendant's attorney, or some one on his behalf, attended the master, and no one appearing for the plaintiff, and no bill being produced on behalf of the plaintiff, a nominal bill was taxed at the sum of 8s. 8d. or thereabouts, as the plaintiff's costs in this cause. About the 17th March, 1857, the plaintiff's attorney made up and served his bill of costs as between attorney and client in this cause, and demanded payment thereof, but after some few days' delay, the payment was refused on behalf of defendants, and he further refused to assent to any taxation thereof, insisting that the taxation already had put an end to the matter. It does not appear certainly, that the sum so taxed was ever paid or tendered by defendant; but the probability is, from circumstances stated, that it was so tendered and was refused.

In Easter Term, 1857, *Macdonald, J.*, obtained a rule in the Practice Court, returnable in the full court, calling on the defendants to shew cause why the taxation of nominal costs and all subsequent proceedings should not be set aside or revised, and plaintiff be at liberty to bring in and tax his bill of costs as between attorney and client, on the ground that the taxation and proceedings had were irregular, there being no authority for defendants taking this course, and on grounds disclosed in affidavits, and papers filed. This rule was served on the 6th June, 1857. It was granted on affidavit

setting forth the foregoing facts, and explaining plaintiff's delay to have arisen from a desire to appeal the cause, and to endeavour to obtain other relief against the act 18 Vic., and stating that notice of appeal from the rule made 26th June, 1855, was served before the nominal costs were taxed. That as soon as, upon the advice of counsel, it was determined to abandon the appeal, the plaintiff took steps to get his costs taxed, which will, as is sworn, probably exceed £20; that plaintiff never meant to abandon his claim for costs, but to have the taxation deferred until he could be satisfied he could get no relief from the rule of court of June, 1855.

During this present Easter Term (1858) *Adam Crooks* shewed cause. He resisted the application on the ground of plaintiff's delay in moving against the taxation had in February, 1856, a delay of more than twelve months in serving his own bill, and of sixteen months in applying to the court for relief.

McDonald contended, that the defendant had no right to obtain an *ex parte* taxation, when he obtained the rule in June, 1855, he was in a safe position, for no proceedings in the cause could be taken by the plaintiff except bringing in and taxing his bill; when that was done, and an allocation served, the defendant must pay the costs in order to entitle himself to the benefit of the latter part of the rule. The defendant was not prejudiced by not being compelled at once to pay the plaintiff's costs—the delay would not increase them.

DRAPER, C. J., delivered the judgment of the court.

I am not satisfied that we ought not to treat this rule as lapsed. It was moved a year ago in the Practice Court. During the succeeding Trinity, Michaelmas, and Hilary Terms, it does not appear to have been brought into this court, and a motion made to enlarge it: but there are indorsed on it three memorandas, signed by plaintiff's and defendant's counsel: that it is enlarged by consent to Trinity Term; then again from the 28th of November to the fall of Hilary Term, and from thence to the present term. Michaelmas Term being passed over without any enlargement. It is not open

to parties to enlarge rules of court, by their own consent merely, without motion, or application, or putting any thing on the files, and an enlargement from term to term is, I apprehend, a matter of mere indulgence—an act of the court, not of the parties.

I think the court is bound to preserve regularity in these matters, and not to permit its rules to be enlarged and kept alive by consent out of court, and without any notice or proceedings in court, and without a single paper connected with the rule so enlarged being on the files. As, however, the parties have been heard, without the objection being suggested by any one, we may dispose of the rule.

On the merits, I think, notwithstanding the delay, up to February, 1857, or to Easter Term, 1857, (and the defendant is a consenting party to the delay since), that the plaintiff ought to succeed. The legislature were conferring a very unusual favour on defendants, against whom rights of action had accrued, and against whom, possibly, judgments had been rendered, founded on such rights of action, in enabling them to obtain a discontinuance of such proceedings on payment of the plaintiff's costs of suit, as between attorney and client. I do not feel called upon to extend the remedy, by converting this substantial payment into a mere sham, because the plaintiff has delayed bringing on his bill of costs. The defendant had a rule on him requiring this; he might have acted on that rule, and enforced compliance with it, but I do not consider him warranted in acting under a practice, obtaining under totally different circumstances, wishing apparently to evade the fulfilment of the conditions imposed by the legislature, before he can obtain the relief provided in the act. His refusal to attend and tax the plaintiff's bill when rendered, and his assertion that the matter was ended by the *ex parte* taxation, lead to this conclusion. It appears to me he ought at once to have consented, that his own proceedings were not a proper mode of following up the rule which he obtained, and, therefore, that this rule should be made absolute with costs.

Rule absolute with costs.

REGINA V. GORDON ET AL; and
REGINA V. ROBSON ET AL.

Criminal Conviction—Costs.

Upon an application for a rule to tax the costs of proceedings on indictment under 5 & 6 W. & M., ch. 33, and that they should be allowed to a particular person.

The court refused the rule. A side bar rule is granted in England to tax these costs as a matter of course, but this application went further.

The defendants were indicted for nuisance in obstructing a highway leading along the bank of the river Bayfield, in the township of Stanley, before the general quarter sessions of the peace, for the united counties of Huron and Bruce. They removed the indictments into this court by certiorari, and the defendants were afterwards severally convicted, and judgment upon a case reserved was given against them.

C. Robinson, applied for a rule absolute, ordering the costs of prosecuting the indictment to be taxed by the master, and that the said costs shall be allowed to the municipality of the township of Stanley, as the prosecutors of the said indictment, and paid by said defendants to the said municipality.

DRAPER, C. J., delivered the judgment of the court.

The right to costs depends upon the English statute 5 & 6 W. & M., c. 33. Section 3 enacts, that if the defendant prosecuting such writ of certiorari be convicted of the offence for which he was indicted, then the court shall give reasonable costs to the prosecutor, if he be the party grieved or injured, or be a justice of the peace, mayor, bailiff, constable, headborough, tithingman, churchwarden, or overseer of the poor, or any other civil officer who shall prosecute upon the account of any fact committed or done that concerned him or them as officer or officers to prosecute or present.

In the cases which I have looked at, a side bar rule to tax the costs seems to have issued as a matter of course. It is apparently, from the authorities, the regularly established practice; though, as is said in *Regina v. Hills* (2 E. & B. 180), when the side bar rule is obtained the officers do not proceed to taxation till notice has been given to the bail. I observe *Mr. Robinson's* motion, however, goes further than the

ordinary side bar rule would ; it asks us to determine who, as prosecutors, shall be entitled to recover these costs. I think this is not the mode of bringing up that question, if there be really any doubt upon it. In several of the cases this point has been discussed on a motion to set aside the side bar rule, when both parties are before the court ; or it may, I conceive, come up, on opposing a motion for an attachment for non-payment of the costs taxed after demand made, as required by the statute.

It appears to me, no reason or authority is shewn for departing from the ordinary practice, in this case.

Mr. *Robinson* referred us to *Regina v. Dobson*, 9 Q. B. 302 ; *Regina v. Williams*, 6 Q. B. 273 ; *Regina v. Wilson*, 1 E. & Bl. 597 ; *Regina v. Earl Waldegrave*, 2 Q. B. 341 ; *Regina v. Bishop*, 6 D. & L. 499 (also reported in 13 Jur. 538, and in which many of the cases are collected) ; *Rex v. Kettleworth*, 5 T. R. 32 ; *Rex v. Incedon* 1 M. & S. 268 ; *Rex v. Taunton St. Mary*, 3 M. & S. 465.

I refer also to *Regina v. ———*, 15 Q. B. 1060, and 15 Jur. 55 ; *Regina v. Hodgson*, 7 Exch. 915 ; *Reg. v. Hills*, 2 E. & Bl. 176 ; *Reg. v. Buchanan*, 13 Jur. 423 ; *Reg. v. Eardisland* 3 E. & Bl. 960 ; *Reg. v. Jewell*, 7 E. & Bl. 140.

AMERICAN EXCHANGE BANK V. McMICKEN.

Bill of Exchange—Damages.

Held, that 6 per cent damages are chargeable upon a protested bill of exchange drawn in Upper Canada, accepted in Upper Canada, payable in the United States—upon the authority of *Ross v. Winans*, 5 U. C. C. P. 185.

DECLARATION on bill of exchange, dated 20th August, 1857, drawn by Warner on McMicken payable to Warner's order for \$600, accepted by McMicken, and endorsed by Warner to plaintiffs. Admission of payment of \$50, and claim for the residue. Pleas, denying the drawing and acceptance.

The trial took place in Toronto in April last, Before

Richards, J. The bill was produced, and the signatures of both defendants proved. It read thus :

“\$600.”

“Clifton, 20th August, 1857.

“Thirty days after date, please pay to my order at the Bank of Commerce, in the City of New York, the sum of six hundred dollars, value received.

“To GILBERT McMICKEN, Esq., NATHANIEL WARNER.
Clifton, C. W.”

A notarial protest was put in, and presentment on 22nd September, 1857, at the Bank of Commerce, in the city of New York, was thereby proved. The only question was whether the plaintiffs could recover in addition to the principal sum, with interest and notarial charges, six per cent. damages.

In Easter Term *Boyd* obtained a rule *nisi* to add such damages to the amount of the plaintiff's verdict. He cited *Ross v. Winans*, 5 U. C. C. P. 185.

M. Vankoughnet shewed cause. He contended it was an inland bill, drawn in Clifton, in Upper Canada, on a resident in Clifton, U. C., and accepted there, and the fact that it was drawn payable at the Bank of Commerce, in the city of New York, did not make it a foreign bill.

DRAPER, C. J., delivered the judgment of the court.

This case is not to be distinguished from that of *Ross v. Winans*, cited by Mr. *Boyd*, and the law having been thus determined by a judgment of this court, we ought not to disturb it.

Rule absolute.

MORAN V. CURRIE.

Assignment—Mortgage.

Upon ejectment brought to try the title to land.

Held, that the word assigns in the conveyance under which the plaintiff claimed did not pass a fee.

EJECTMENT for the south half of No. 9, 12th concession of Mariposa.

Writ issued the 6th of August, 1857. Defence general. The plaintiff gave notice of claim under a mortgage in fee, dated the 5th of December, 1850, whereby defendant covenanted to pay £130 to one Jeremiah Cole by certain instalments, particularly specified, which indenture of mortgage

was assigned by said Cole by deed, dated the 5th of March, 1857; and the plaintiff asserted that the defendant had made default in a payment due on the 1st of February, 1857. The defendant gave notice that he intended to defend by virtue of a deed from plaintiff to defendant, and that there was no default in payment on the mortgage.

The trial took place before *Draper*, C. J., at Peterboro', in May last. The mortgage deed referred to in the plaintiff's notice of claim was produced, and the execution thereof was admitted. It was from the defendant to one Jeremiah F. Cole, in fee, subject to a proviso for making the same void on payment of the sum of £130, by certain instalments, of which one of £25 fell due on the 1st of February, 1857. On this mortgage was endorsed an assignment, executed by Jeremiah Cole, in the words following: "I, Jeremiah Cole, of the township of Sophiasburg, in the county of Prince Edward, and Province of Canada, for and in consideration of the sum of £130 currency, to me in hand paid, the receipt whereof is hereby acknowledged, do hereby assign to Daniel Moran, of the same place, yeoman, his executors, administrators and assigns, all my right title and interest in and to the within mortgage. In testimony whereof, &c." Signed and sealed by Cole.

On this evidence I directed a verdict for plaintiff, reserving leave to defendant to move to enter a nonsuit.

Eccles, Q. C., obtained a rule *nisi* accordingly in Easter Term.

O'Hare shewed cause. He objected, 1st, that no ground on which the rule was granted was set forth in the rule. 2nd. That under the 222nd and 224th sec. of the Common Law Procedure Act, 1856, the defendant was not in a position to raise any question on the validity of the plaintiff's title; because although he had asserted title in himself in his notice to the claimant, he had omitted in that notice the words, "besides denying the title of the claimant," and therefore he must be considered as admitting the claimant's title set forth in his notice. He contended, also, that the assignment was sufficient to entitle the plaintiff to recover—that the land would pass by the word "assign." He cited *Mathews v.*

Wallwyn, 4 Ves. 118; Williams v. Sorrell, *ib.* 389; Martin v. Mowlin, 2 Burr. 978, *per* Lord Mansfield; 4 Cruise, dig., 97; 2 Crabbe, 584; 6 Mod. 109; Doe v. Fox, 3 U. C. Q. B. 134.

DRAPER, C. J., delivered the judgment of the court.

It appears to me that we cannot deduce from the words used, and we have no right to resort to any thing else in the present case, that it was the intention of the parties that the land mortgaged should pass by the instrument endorsed thereon. In the first place the word "assign," is the only conveying term that is used, and this is a word which is employed more generally in reference to a term, than to any other estate, although any estate or interest in lands may by apt words be assigned; and the assignment being to the plaintiff, his executors, administrators and assigns, only shews further that an estate of inheritance or in fee simple was not contemplated to pass. No doubt a Court of Equity will do all that is necessary to enable the assignee to recover the debt, and will enforce the mortgagee to join in any proceeding necessary to secure the plaintiff's interest. This case is readily distinguishable from that of Doe v. Fox, cited by Mr. O'Hare, where the *habendum* (there is none in this case) referred to the "interest conveyed by the mortgage in and to the lands described therein, to the assignees, their heirs, &c.," and where the words of conveyance were, "grant, bargain, sell, assign, and set over." In my opinion the land did not pass by the words of the assignment. But Mr. O'Hara has raised an objection that the grounds on which the rule was granted were not stated therein in accordance with the Common Law Procedure Act, 1856, sec. 168. This objection was not, however, sustained by the production of the copy served of the rule verified by affidavit, nor was the original before us; and as we are authorised to permit the rule to be amended, and served again on terms, and as Mr. O'Hare argued the substantial question raised, I think we are warranted in passing over the objection as not sustained in fact before us. He further objected that the defendant had precluded himself from objecting to the

sufficiency of the plaintiff's title by not stating in his notice of title that he denied the plaintiff's title in accordance with the 224th sec. of the Common Law Procedure Act, 1856. But we must read this section not only in connexion with the 222nd sec., but also with the 234th section of the same act, which shews that on a writ and appearance to defend being set out in proper form on the N. P. record, the question at the trial shall be "whether the statement in the writ of the title of the claimant is true or false;" and it does not appear to me that the omission of the words in the defendant's notice, "besides denying the title of the claimant," which is in effect done by the entering of appearance, dispenses with the plaintiff's proving his title when the defendant appears.

On the whole I am of opinion this rule should be made absolute.

TUCKER V. PAREN.

Pleading—Prescriptive right—Possession.

In an action brought to try the right to water, the defendant by his plea admitted that he had raised his dam to a greater height than he was legally entitled to do, but denied the consequences arising from such act. Upon demurrer, *held* good.

The declaration asserted that the plaintiff was possessed of a certain close, and by reason thereof was entitled to the flow of a stream for working a mill thereon; and the defendant by erecting a dam higher up the stream aforesaid of a much greater height than he was legally entitled to do, diverted the water from the said mill, and deprived the plaintiff of the use of it.

To which the defendant pleaded, thirdly, that by virtue of twenty years' user next before the commencement of this suit, the defendant was entitled to the right to *retain* the water in the declaration mentioned, for certain hours and times during the day, and that although true it is that the plaintiff's dam is of a greater height than it was twenty years ago, yet the defendant says that he does not by reason thereof *retain* the water for a longer period in each day than he is entitled to do by reason of the said twenty years' use.

To this the plaintiff demurred, assigning as the grounds that—1st. The plea shows no answer to the plaintiff's cause of action.

2nd. That the defendant thereby admits the raising of the dam as complained of.

3rd. Shews no prescriptive right to raise the dam.

Eccles, Q. C., supported the demurrer.

Galt, contra.

DRAPER, C. J., delivered the judgment of the court.

The declaration states that the plaintiff was possessed of a close, and by reason thereof was entitled to the flow of a stream for working a mill thereon, and defendant, by erecting a dam higher up the stream of a much greater height than he was legally entitled to do, diverted the water from the mill, and deprived plaintiff from the use of it.

The declaration is a modification of the form given in the schedule to the Common Law Procedure Act, in schedule B., and the modification must be taken to have been intended by the pleader to meet the assumed facts of the case. The statutory forms are only given by way of example, but not as superseding the necessity of meeting the statement in the declaration to the evidence which the plaintiff intends to adduce.

The plea states, that by virtue of twenty years' user next before the commencement of the suit, the defendant was entitled to the right to *retain* the water in the declaration mentioned for certain hours and times during the day; and admitting that the plaintiff's dam is higher than it was twenty year ago, yet that it does not retain the water for a longer period each day than he is entitled to by twenty years' use.

To which the plaintiff demurs. The term *to divert* implies the turning off the water from any course or direction in which it otherwise would flow. It may perhaps be so far extended as to mean a change not simply from the channel in which it would naturally flow, but also a change in the uninterrupted regularity or continuity of the current. It is only in this sense that the plea meets the allegation of the

diverting of the water, by denying that the water is retained, that it is diverted from the regularity of its flow for a longer period than twenty years' user justifies.

The declaration is framed so as to charge an excess upon a lawful right by erecting a dam of a greater height than defendant was legally entitled to. The plea admits that the dam is higher than twenty years' enjoyment sanctions; and the plaintiff's argument is, that this admission involves, of necessity, the admission of the injury complained of in the declaration.

But we must assume the defendant to have lawful possession of the dam, of the raising whereof plaintiff complains; and then the raising complained of is an act done by defendant on his own property. His plea admits this act, but it denies that from it there results to the plaintiff any cause of complaint, for it goes on to assert that the former dam gave him a right to retain the water during certain hours and times, and that he retains it no longer by the increased height of his dam. If the fact be otherwise, the plea might have been traversed; but it is admitted, and the argument against the plea is, that it admits the excess complained of in the declaration, and admitting all that is complained of, can contain no answer. But I read the plea as admitting the only act charged to be done by defendant, but denying that such act causes any change in the flow of the water, and therefore denying that it affords to the plaintiff a cause of action for any injury or damage as the result of that act.

I think the defendant entitled to judgment.

ERRINGTON V. DUMBLE.

Taxes—Sheriff's sale.

Held, that the plaintiff in ejectment brought upon a sheriff's title under a sale for taxes, must prove that the writ to sell was grounded on the treasurer's return declaring the assessments to be eight years in arrear on this particular tract of land.

In this action of ejectment the only point arising to prevent the plaintiff's recovery is the not giving in evidence at the trial (at Cobourg last assizes before *Draper*, C. J.) the

return of the treasurer of the Newcastle District to the court of General Quarter Sessions of the account of all lands in his district on which the assessments were in arrear, and which is recited in the warrant issued by that court on the 15th July, 1829, 6 Geo. IV., ch.6, s. 7, under the signature of the clerk of the peace, directed to the sheriff of Newcastle, authorising the sale of these lands for taxes in arrear.

Evidence was given that the lands were included in the schedule of the surveyor-general, and also that no taxes whatever had been paid thereupon for eight years and upwards prior to the date of this warrant. The necessary evidence of the sheriff's sale, the deed from him, and the certificate for registry thereof were proved, and a deed from the sheriff's vendee to the plaintiff.

DRAPER, C. J.—That such proof is necessary, generally speaking, is settled by the case of *Doe Bell v. Reaumor*, 3 U. C. old series, 243 ; where the court held that it is incumbent on the plaintiff in such a case to shew at the trial "that the writ to sell was grounded on the treasurer's return declaring the assessments to be eight years in arrear on this particular tract of land." See *Munro v. Grey*, 12 U. C. Q. B. 647.

There are two respects in which this case differs from the foregoing. First, the treasurer, who was present in court with his books, proved that in fact the taxes for which the warrant directed the sale were unpaid. Second, that nearly thirty years have elapsed since that return must have been made.

It was not, however, suggested at the trial that there was any real difficulty in giving evidence of the sheriff's return. The probability was, that it is in the office of the clerk of the peace.

If the plaintiff had been in a position to give secondary evidence, he might have proved that such a return had been made, and that it was or would have been well-founded appeared from the evidence of the treasurer's books that were in court.

I think we should be encouraging carelessness in the preparation of evidence and getting up a case if we were to hold the proof given sufficient, for there is no reason suggested

why the treasurer's return should not be produced. Strictly speaking, I think the defendant is entitled to prevail on this motion to enter a nonsuit on leave reserved, but I am willing, as I think it is in the power of the court, to grant a new trial on the plaintiff's paying the costs of the last trial, otherwise I think we are bound to make the rule absolute.

DICK V. HERON.

Agreement—Evidence.

The plaintiff was engaged by one, on behalf of all the owners of a steamer, to sail her by the season. This arrangement was verbal, and with the understanding that it was not determinable without some notice; he sailed her during the years 1855 and 1856, under this arrangement, during which time the owner who had made the arrangement, sold out, and during the summer of 1857 the vessel was not run. The plaintiff brought this action, contending that he was entitled to his salary for that year under the agreement.

Held, that the evidence shewed no agreement for 1857.

This action was brought for salary, as Captain of the steamer "Peerless. *Pleas*: £5 paid into court, and *nil debet* as to remainder. 2. Payment.

The case was tried at the last winter assizes, before *Burns, J.*

The steamer Peerless was, in 1854, owned by several parties, one of whom was a brother of the plaintiff, and in that year he, as managing owner, made a verbal agreement with plaintiff, that he should sail the Peerless by the season, as master, for £250, which agreement was not determinable by either party, unless by notice in some way. And under this agreement the plaintiff sailed the "Peerless" in 1855 and 1856.

The plaintiff's brother sold out his shares in 1855. In 1857 the "Peerless" was not run at all, though the defendant kept her (he then being principal and managing, if not sole owner) in readiness to run, till about the 25th May, expressing an intention to run her; but putting it off from week to week until he finally abandoned it. On the defence, there was evidence that the defendant had told plaintiff in February, 1857, that he should not require his services for that year, and that plaintiff was negotiating with other

parties for a wholly different employment, quite inconsistent with the idea of his being under any engagement with the defendant.

The learned judge was of opinion that the weight of evidence was in defendant's favour, shewing there had been no contract for 1857; that an engagement by the season implied no more than an engagement for the season.

The jury found for the plaintiff, and damages £100.

In Hilary Term, *Connor*, Q. C., obtained a rule *nisi* for a new trial, on the ground that the verdict was contrary to law, evidence, and the judge's charge.

In the present term, *Eccles*, Q. C., shewed cause. He contended the agreement was a continuing one, and was not put an end to.

DRAPER, C. J. delivered the judgment of the court.

The jury seem to have rather undertaken to compromise the matter, than to decide the question whether defendant had entered into an agreement for plaintiff's services for the year 1857. If he had, he was clearly in fault for the breach of it, and the plaintiff was entitled to the salary for that year, which the jury have not given him. And if there was no such agreement, the verdict should have been for the defendant.

We are all of opinion that the evidence shewed no such agreement, and therefore the rule should be made absolute, costs to abide the event.

HENDERSON V. SILLS.

Replevin—Pleading.

Held, that the plaintiff in replevin can recover for such portion of the property replevied as he can prove title to; and that the plea of not possessed is divisible.

REPLEVIN for 15,000 pieces of white oak pipe staves.
Pleas: *non cepit*, and plaintiff not possessed.

The trial took place at Sarnia, in May, 1858, before the Chief Justice of Upper Canada. It was proved that the plaintiff had a title to lot No. 22, 5th concession of Sombra,

and that he had purchased from the crown, lot No. 20, in the same concession, and had on 1st October, 1853, paid a first instalment thereon. The purchase was in the receipt for the first instalment stated to be on the following conditions: that no timber was to be used except for the improvements thereof, without first arranging for that purpose, or paying up the whole of the purchase money, of which an instalment of one-tenth would fall due on the first of January in each year, with interest. On the 23rd September, 1854, the plaintiff paid a second instalment with interest. It was not proved when he made any further payment; but he got a patent from the crown for this lot on the 25th January, 1858. The defendant appeared to have had notice of the plaintiff's right to these lots, before the staves in question were removed from the lots, as he spoke to one witness about his readiness to satisfy plaintiff if he had trespassed, and to another he said he was about buying the land, alluding to that upon which the timber was cut, from plaintiff. It was proved that 113 white oak trees were cut between January and March, 1857, on lot No. 20, and 60 or 70 on lot No. 22, and were made into staves by men employed by defendant. It was sworn that each tree would make on the average 30 staves, and the plaintiff's witnesses said 40. The defendant had together from 15 to 18,000 staves cut on these and other lots of land in the neighbourhood, and of these the plaintiff, as sworn by the deputy-sheriff, replevied 6000, and according to any reasonable calculation founded on the whole evidence at least that quantity were taken from lots No. 20 and 22. At the estimate of the defendant's witnesses, and assuming 65 trees cut upon 22, there would be 1950 taken from that lot, and 113 trees on lot 20, at 30 staves to the tree, would give 3390. At the estimate of the plaintiff's witnesses, the whole quantity would be 7500.

The learned Chief Justice left it to the jury to say how many staves were cut off each of these lots, reserving leave to defendant to move to reduce the number by striking out those cut upon No. 20, if the plaintiff was not entitled to recover for them. He ruled that on not possessed the issue was divisible, and that they might find for plaintiff for a less

number than were replevied; and that the plaintiff might replevy for such number as he could prove title to, though mixed with others, which the defendant had together.

The jury found for the plaintiff, and that 1680 staves were cut upon lot No. 20, and 1050 on lot No. 22, total, 2730.

In Easter Term *A. Prince* obtained a rule *nisi* for nonsuit on leave said to be reserved, or for a new trial on the law and evidence, and for misdirection in this, that the plaintiff could not maintain this action without identifying the particular staves replevied.

Becher, Q. C., also obtained a rule *nisi* for a new trial, on the law and evidence, contending that plaintiff proved a clear right to recover for as many staves as he actually replevied. Both rules came on together. The only authority cited was *Darby v. Harris*, 1 G. & D. 234; 5 Jur. 988, reported also 1 Q. B. 895.

DRAPER, C. J., delivered the judgment of the court.

I am not quite satisfied, that the plea of not possessed, without asserting property either in the defendant, or some other person than the plaintiff, is sufficient, though by taking issue on it, the plaintiff has waived any objection upon that ground. But as (at least according to the law of England) replevin will not lie unless there has been, in the first instance, a taking of the goods replevied out of the hands of the owner; his possession, without other proof of property, would entitle him to maintain trespass against any wrongdoer who took them away, and therefore a plea, which *primâ facie* would be met by mere proof of possession, can be no answer in replevin, when the goods replevied must, in the first instance, have been in the plaintiff's possession, and having been taken by the defendant are replevied by the plaintiff, who thus regains possession of them. The pleas in the old entries seem to have gone further than a denial of the plaintiff's property; they set up also a property in the defendant, or some one else.

Our statute, 14 & 15 Vic., ch. 64, enacts that whenever any goods, &c., have been, or shall be wrongfully distrained, or otherwise *wrongfully taken*, or have been, or shall be

wrongfully detained, "the owner, or person, or corporation, who by law can now maintain trespass or trover for personal property, shall have and may bring an action of replevin for the recovery of such goods, &c., and for the recovery of the damages sustained by reason of such unlawful caption or detention, or of such unlawful detention, in like manner as actions are now by law brought and maintained by any person complaining of an unlawful distress."

The expression "the owner, &c., who by law can now maintain trespass for personal property," is not very distinct, It may mean the owner, who under the circumstances could maintain trespass or trover for the recovery of damages for the taking or conversion of such goods, may, in his option bring replevin, though the latter words "in like manner as actions are now brought," by persons complaining of an distress, may seem to point to a restriction in the case of replevin. This point has been remarked upon by my brother Hagarty, in delivering the judgment of this court in *Crawford v. Thomas* (7 C. P. U. C. 63.) The 9th section provides that the same plea may be pleaded in abatement, or bar, as heretofore, and that the defendant may plead as many matters in defence as he shall think necessary. The latter part of this clause is also not very clear in expression, but I take it to mean that defendant may plead such matters as would constitute a legal defence when the taking is complained of, as in the action of trespass, and where the detention only is complained of, as in an action of detinue. This view would tend to sustain the sufficiency of the plea of not possessed.

The object of such a plea must be to obtain a return, although none is prayed for. If the plea had asserted property in defendant, or in a stranger, and the plea were found for him, he would be entitled to a return, and so I apprehend must be the case here, assuming the plea correct, for the defendant should have restitution of that which has been taken, without any right, in the plaintiff, out of his possession. Still I do not see why, if we must assume that the plaintiff had possession of the goods, and replevied them

out of defendant's possession who had taken them, that the burden of the issue can be cast upon the plaintiff.

I think it is clear that on a plea claiming property in the goods replevied, the defendant may have a return of such part as he could prove he had a right to take out of plaintiff's possession in the first instance, and of which the plaintiff regained possession by the replevin. But if it be true that the whole object of the former part of the first section of the statute was (and I strongly lean to this conclusion) to extend the remedy to other cases than distresses for rent, rather than to make the remedy universally concurrent with trespass or trover; then applying the principles which govern the action of replevin in England, the right to have a return must proceed from matter advanced on the defence, unless, indeed, the plaintiff becomes nonsuited or discontinues. And on this view, I think though the plaintiff may have replevied more staves than he is found to have a right to keep, yet, as the evidence shewed he had a right to a part of those which he replevied, or better, perhaps, that there was a part which he had no right to replevy, the case was properly left to the jury to determine.

If, therefore, leave had been reserved to move to enter a nonsuit, which, upon examining the learned Chief Justice's notes, I do not find to be the case, I think we ought to have discharged it.

I cannot say that I am satisfied with the finding on the evidence, and as both parties ask for a new trial, I am willing to grant one, with costs to abide the event.

See *Wildman v. North*, 2 Lev. 92; *Moore v. Watts*, 2 Salk., 581; *Barrett v. Termshaw*, Comb. 477; *Bulcher v. Porter*, Shore 401; 1 Salk. 5, 99. *Selbry's Entries*, 357, 358; *Wildman v. Norton*, Vent. 249; *Mennic v. Blake*, 2 Jur. N. S. 953; 6 E. & B. 842; *Gibbon*, Repl. 213.

FORBES V. THE SCHOOL TRUSTEES SECTION 8, OF PLYMPTON.

School contract—Pleading.

Upon an action brought on a contract entered into by two of three trustees of a school section under their corporate seal. Plea "*non est factum*." The jury having found for the defendants, a new trial was ordered.

The first count of the declaration stated that the defendants being the duly elected trustees of school section number eight, in the township of Plympton, did by agreement under their hands and seal of the corporation, accept of a tender made to them as such trustees by plaintiff, to build a school-house in such section, and did agree to pay plaintiff \$380 on the 15th of August, 1857. Averment, that plaintiff built the school-house, but defendants refused to pay. 2nd count, for work, labour, and materials, &c. *Pleas*—to the first count, 1. *Non est factum*. 2. Payment. 3. A special plea demurred to. 4. Set off. Issue on 1st, 2nd, and 4th pleas.

At the trial at Sarnia, in May, 1858, before the Chief Justice of Upper Canada, the plaintiff proved that he, on the 25th of May, 1857, put in a tender to the trustees of this school section to build a school-house for \$380, according to the plan and specifications which they had previously prepared. On the same day two of the three trustees signed and affixed the corporate seal to the following instrument: "We, the undersigned, accept of the tender of George Forbes for the erection of a commodious school-house, according to the plan and specification, on the new site of No. 8 school section, Plympton, and we agree to give him the sum specified in his tender, being \$380, and to pay the same on the 15th day of August next." They also took from the plaintiff a bond to fulfil the work tendered for. Upon this the plaintiff executed the work, and finally the two trustees accepted it. It was proved by the third trustee that the other two did not consult with him about the contract made with the plaintiff. On the part of the defence evidence was gone into to show that this school-house was built upon a new site, different from that on which the old school-house stood; that the change of site was not made in the manner required

by the school acts, and that the trustees had acted against law in entering into the contract. The learned Chief Justice was of opinion that upon the pleadings the plaintiff was entitled to succeed. No evidence either of set off or payment was given, and all rested on the issue of *non est factum*. The jury, however, found for the defendants.

In Easter Term *A. Prince* obtained a rule *nisi* for a new trial, the verdict being contrary to law and evidence and the judge's charge, and that the plaintiff was at all events entitled to recover on the common counts.—Citing Grant on Corporations, sec. 68, 70.

McMichael shewed cause.

DRAPER, C. J., delivered the judgment of the court.

On the issue of *non est factum*, I think the case was fully proved. The corporate seal was to the instrument produced, and it was signed, if that were necessary, by two of three trustees. Whether under any other form of pleadings it can be established that this, although in form the deed of the corporation is not legally binding in a court of law, or whether there be any remedy, if, as is suggested, the entering into a contract contrary to law and to the prejudice of the ratepayers of the section, be a breach of trust or a fraud committed by the trustees signing the instrument and affixing the corporate seal to it, I do not at present stop to enquire. On the plea of *non est factum* the verdict is clearly wrong and must be set aside.

See *Prince of Wales Assurance Company v. Athenæum Assurance Society*, 31 Law Times, p. 149; per Lord Campbell, C. J.

FORBES V. THE SCHOOL TRUSTEES OF SECTION 8, PLYMPTON.

Contract—Pleading.

Held, that a contract entered into by two trustees under the school acts, with the corporate seal attached is sufficient, and a plea that it was signed by the two subscribing trustees without the consent or approbation of the third *held* bad.

The declaration stated that defendants under their corporate seal accepted a tender, and agreed to pay \$380 to the plaintiff for building a school-house.

To which defendants pleaded thirdly, that the tender was accepted and the contract made by two of the trustees without the consent or knowledge of the third, and he had no opportunity of agreeing or dissenting thereto.

The plaintiff demurred on the grounds: 1st. That the same is no answer in law to the said declaration, as the plaintiff declared against the school trustees as a corporation, and not in their individual capacity. 2nd. That it was not the duty of the plaintiff to ascertain whether two of the three trustees acted alone or with the third, or whether they notified him, a majority of the trustees having signed the contract and affixed the corporate seal thereto as required by statute. 3rd. That the defendants cannot, as against a contractor, the plaintiff, take any advantage of their neglect or omission to perform any duty imposed on them by the act, of which neglect or omission the plaintiff had no notice. 4th. That it is no answer to the declaration to affirm the want of acquiescence or confirmation by one of said trustees of the acts of the other two. "The Upper Canada School Act of 1850," not requiring such acquiescence or confirmation, and that the said plea is in other respects uncertain, informal, and insufficient.

A. Prince supported the demurrer.

McMichael contra, cited *McGregor v. Pratt*, 6 U. C. C. P. 173.

DRAPER, C. J., delivered the judgment of the court.

I do not find any ground upon which the third plea can be sustained. The trustees of each school section are made a corporation by the statute 13 & 14 Vic., sec. 10, and I do not find anything in the act which makes it necessary to the validity of a contract made by such corporation that it should be signed by the trustees as well as have the corporate seal affixed to it.

Nor is there any thing in the statute which makes it necessary that the three members of the trustee corporation should be unanimous in affixing the corporate seal. The statute contemplates there being a necessity in consequence of the death, removal, &c., of any member of the trustee

corporation, for a special election to supply his place, but it contains nothing to lead to the inference that until such election the power of the corporation to contract, &c., under seal, are suspended.

With regard to the site of a school-house, sec. 11, of 13 & 14 Vic., ch. 480, recognises the authority of a majority of the trustees. Section 12, 2ndly, authorises the issue of a warrant signed by a majority of the trustees, which apparently requires no seal.

Independently of these considerations, I think that the trustee corporation cannot set up as a defence to an action founded on an instrument under their corporate seal, that one of the three trustees had no notice of the proceeding, nor any opportunity of agreeing to or dissenting from the making and sealing such instrument. There is no charge of fraud or collusion on the part of the two trustees who, being a majority, it is admitted did affix the seal, nor is there any averment that the plaintiff had notice or was a party to any of the acts of the majority of the trustees in reference to the third trustee.

The cases cited for the defendants do not touch the question.

I think the plaintiff is entitled to judgment on demurrer.

Vide Prince of Wales Assurance Company v. Athenæum Assurance Company, 3 Law Times, p. 149; per Lord Campbell, C. J.

Judgment for the plaintiff.

MACFARLANE V. MACWHIRTER.

Bail—Recognizance.

The defendant being arrested, gave bail to the sheriff, under the 7th sec. of 16 Vic., ch. 175, within 30 days a recognizance was entered into as bail to the limits, and a certificate of its allowance given by the deputy-clerk of the crown. The defendant having broken the condition of this recognizance, an action was commenced thereon, but failed, the recognizance having been entered into before a person not duly authorised to take it. The plaintiff then applied to a judge in chambers to get the certificate of allowance of the recognizance to the limits set aside, which was granted.

Upon a rule taken out to rescind the order of the judge who set aside the allowance of the recognizance to the limits, it was made absolute. *Draper*, C. J. concurring upon the ground that if it stood it would prevent an appeal to decide whether the bail were liable.

The defendant Macwhirter was arrested on a writ of

capias ad satisfaciendum, in August, 1853, and gave a bail bond to the sheriff of Prince Edward, executed by himself and three sureties. It does not appear what the condition of this bond was. On the 12th of September following, and within thirty days after the arrest, the defendant and two sureties, one of whom had joined in the bond to the sheriff, entered into a recognizance in order to obtain the benefit of the limits of the gaol of the county of Prince Edward. This recognizance was allowed by the judge of the county court of that county, and was filed in the office of the deputy-clerk of the crown for that county, on the 17th of September, 1853, who gave the certificate to the sheriff required by the statute 10 & 11 Vic., ch. 15, sec. 5. The plaintiff afterwards brought an action on this recognizance for the departure of the defendant from those limits. The action failed in consequence of the recognizance having been taken before a party having no lawful authority. See the proceedings and judgment in 6 U. C. C. P. 496.

In March, 1857, *McLean*, J., made an order setting aside the certificate of the deputy-clerk of the crown, and also directing that this certificate should be taken off the files in the office of the sheriff, and that the filing thereof should be cancelled.

Sometime in the month of May, 1857, an action appears to have been brought by the plaintiff, as assignee (as is suggested) of the sheriff upon the bail-bond given to the sheriff prior to this recognizance.

In Easter Term last (on 13th June, 1857), a rule *nisi* issued out of this court to set aside the order of *McLean*, J., on the grounds: 1st. That the sheriff's bail were discharged by the delivery of the said certificate to the sheriff, as to any breach of that bond.

2nd. That a judge in chambers had no power to make an order setting aside such certificate, and ordering the same to be taken off the file, and that in the meantime all further proceedings in the action against the sheriff's bail be stayed.

This rule was enlarged from term to term until Hilary Term, when *Hector Cameron* shewed cause. He called at-

tention to the affidavit of the plaintiff's attorney, that he had no notice pursuant to the statute that the recognizance of bail was put in, and therefore could not except to them, or oppose their being allowed. He also urged that the defendant and his sureties on the recognizance, having denied its validity and succeeded in that denial, could not be heard to prevent the allowance of such recognizance being taken off the file, and that the defendant in this cause, and one of the defendants in the action on the recognizance were sued on the bail-bond. He cited Archbold's Practice, 797, and the cases in the notes, and 2 Old Series, 340, *McDonell v. Rutter*

Richards in support of his rule referred to the statute 16 Vic., c. 175, sec. 7, under which the bond to the sheriff was taken, and to sec. 8, which provides that the parties to such a bond shall, after delivery of the certificate of allowance to the sheriff, according to sec. 5 of 10 & 11 Vic., be discharged from all damages on occasion of the breach of the condition of such bond, which shall be committed subsequent to the date of such certificate. He cited *Stockham v. French*, 1 Bing. 365; *A'Becket v. ———*, 5 Taunt. 776, and *Shee v. Abbott*, 2 B. & B. 619.

DRAPER, C. J., delivered the judgment of the court.

The facts set forth are simple. The defendant was arrested on a *ca. sa.*, and gave a bail bond with sureties to the sheriff of Prince Edward, to whom the *ca. sa.* was directed, with a condition pursuant to the 7th section of 16 Vic. ch. 175. Within thirty days from the date of this bond a recognizance of bail was entered into within the counties of Lennox and Addington, before a party who acted as a commissioner for the united counties of Frontenac, Lennox, and Addington. The supposed commissioner had, however, no power to act within those counties, for though he held a commission for the whole Midland District, yet as he was, and for some years continued to be a resident within the county of Prince Edward, at and after its separation from the other counties, his commission, according to the statute of U. C. 1 W. IV., c. 7, sec. 5, was, after the separation, in force only for the county of Prince Edward. Consequently it was held, in an

action brought against the bail named in the recognizance, that the recognizance was void, and in order to recover, (as the defendant has broken the condition, both of the recognizance, and of the bond to the sheriff, by leaving the limits of the gaol of Prince Edward,) the plaintiff has only his remedy on the bail-bond. If that be gone, he has no remedy, unless against the sheriff for an escape, which after taking an assignment of the bail-bond, he would find it difficult to sustain. Under these circumstances the order of *McLean*, J., was made, in order to prevent the allowance and the certificate of the allowance of the bail being set up in bar of the action on the bond. On the merits, I should hesitate to interfere, and the more because the plaintiff having had no notice of the putting in of the bail on the recognizance, had no opportunity of excepting, and cannot be considered as having overlooked or waived the objection to the bail. On the other hand the defendants who gave the bail-bond, might well suppose that after the recognizance was filed, and the bail allowed, they were relieved from all further responsibility. It is easy to conceive a case, in which the sureties in a bail-bond such as this, having obtained security before they would bind themselves to the sheriff, may, on the certificate of the allowance being filed, having given up their security, believe themselves to be discharged. Besides, if the allowance of bail and certificate thereof be set aside, the statutory discharge of the sheriff seems assailed. If the order of Mr. Justice *McLean* stands, there will be no opportunity afforded of taking an opinion of a court of appeal on the legal effect of all the proceedings, and whether they operate to discharge these defendants or no, and on these grounds I have, with some hesitation, concurred with my learned brothers in making the rule absolute.

MILLER ET AL. EXECUTORS OF DUNN V. ANGER.

Devise—Ejectment.

The plaintiffs claimed title under a will by which the testator devised to his widow "1000 acres of land in Walsingham, and if he had less than 1000 acres there, then that quantity to be made up to her out of his Zorra lands." The defendants shewed no title, but contended, that to succeed the plaintiffs must prove that the testator died seised of 1000 acres more than the land in question in Walsingham, and that the plaintiffs should be non-suited.

Upon a motion made on leave reserved, *held*, that the non-suit should be entered.

EJECTMENT for lot No. 13, 3rd concession, Walsingham. Defence for the north half only, claiming under a deed from one George McGill, who had a deed from William McMichael, heir-at-law of Edward McMichael, O. N.

The case was tried at Simcoe, in April, 1858, before *Hagarty, J.* The crown, by letters patent, dated 31 July, 1797, granted this lot to Edward McMichael, who on the 25th September, 1797, conveyed to John McKay. On the 19th of March, 1819, John McKay, son and heir of the said J. McKay, conveyed to Richard Hatt, and he devised the lot (with others) to Reverend R. Leeming and others, in trust, and with power to sell wild lands. The trustees on the 4th February, 1854, conveyed to John H. Dunn, and he by will dated 13th March, 1852, devised all his lands generally to the plaintiff in fee on trust. By a codicil to this will the said Hon. J. H. Dunn devised in fee to his wife one thousand acres of land in Walsingham, and if he has less than one thousand acres there, then that quantity to be made up to her out of his Zorra land.

It was objected, that in order to shew these plaintiffs entitled to recover this particular lot in Walsingham, it was necessary for them to prove that Mr. Dunn died seised of one thousand acres more in Walsingham, for if he had no more than one thousand acres in that township, or a less quantity, it would all pass to his widow by the codicil. The learned judge reserved leave to move upon this point, and the plaintiff had a verdict.

In Easter Term *Wilson*, of Simcoe, obtained a rule *nisi* to enter a non-suit on the leave reserved.

Patterson shewed cause, contending that against a party shewing no title, every thing should be presumed.

DRAPER, C. J., delivered the judgment of the court.

We are all of opinion that the rule should be absolute. Even if Mr. Dunn had died seised of 1100 acres in Walsingham, it would have been necessary to prove that this particular 100 acres had not fallen to the widow. All difficulty would have been removed, if she had joined as a plaintiff, for the title in Mr. Dunn appears satisfactorily proved.

Rule absolute to enter a nonsuit.

THE QUEEN V. TUFFORD.

Forgery—Evidence.

Held, that statements made by a prisoner to the parties who arrested him, he having been previously told on what charge they arrested him, were evidence.

INDICTMENT for forging a promissory note, and a second count for uttering, tried before *McLean*, J., at Milton, on 23rd April, 1858.

O'Reilly, Q. C., moved for a new trial on reception of improper evidence.

DRAPER C. J., delivered the judgment of the court.

The forgery of the note was clearly made out, and also that the prisoner uttered it as a genuine note of one Isaac Cline. The question which was made at the trial, and which is now renewed before us as the ground for a new trial, was, as to the admissibility of certain statements or admissions of the prisoner. It appeared that Isaac Cline and one Cotton had, on hearing that the alleged forged note was in the hands of one Coutle, to whom prisoner had passed it, gone to him and had seen it, and soon after they met the prisoner on the road, Cotton told prisoner that he and Cline wanted him to go with them; and prisoner said he supposed it was about those notes, and said he thought he and Cline could settle it, as prisoner had not made the notes: that one Marlett had made them. Cotton stated that he told prisoner he thought prisoner would have to go before a magistrate, before prisoner made this statement. They went to Hull's tavern and stopped all night, and that prisoner was not allowed to go away from the tavern, until formally arrested the next day. Isaac Cline confirmed this statement, except that he

said he was not aware of any thing to prevent prisoner going away from the tavern that night if he pleased.

The jury convicted prisoner of the uttering, not of the forgery.

As to the admissibility of the evidence see 1 Hale, 589; 2 Hale, 77; Rex. v. Griffin, Russ. and Ry. 151, 2, 3; Thornton's case, 1 Moody, C. C. 27; 2 Lewin, C. C. 49; 17 Jur. 1082.

Rule *nisi* refused.

SCANLON V. McDONAGH.

Arrest.

Upon an action brought for malicious arrest, where the jury, notwithstanding strong evidence to support the defendant's affidavit, and the judge's charge in his favour, found for the plaintiff, the court set aside the verdict, and granted a new trial without costs.

This case comes before the court on a rule for a new trial, obtained by Mr. *Green*, on the ground that the verdict was perverse and contrary to law and evidence, and the charge of the learned judge, and also on the ground of misdirection in this, that the learned judge should have told the jury that the defendant had reasonable and probable cause to arrest the plaintiff.

It was tried at Barrie in April last, before *McLean*, J. It appeared that plaintiff tenanted a farm from defendant, and owed him for rent. He lived on this farm, and had sisters living with him. He had horses, a cow, waggon, sleigh, sheep, pigs, hay, &c., on the farm. Several witnesses, his neighbours, swore there were no rumours in circulation respecting plaintiff's leaving the province, as far as they knew, and that they believed him able to pay what he owed defendant. It was elicited in cross-examination that the plaintiff had removed the greatest part of his property from defendant's farm to his father's place not long before his arrest; that his sisters had removed to the father's, and the plaintiff himself, though on the farm in the day, took his meals and slept at his father's. Since the arrest the plaintiff let the place on shares, and the sub-tenant has plaintiff's horses and property there in his possession. The affidavit to hold to bail was for £50 for the use and occupation of a

farm and dwelling house, and the plaintiff swore he had reason to believe, and verily did believe the plaintiff was immediately about to leave Upper Canada with intent and design to defraud him of the debt. Sworn 9th March, 1858.

On the defence, a witness swore that on the 26th of February, 1858, he wrote to defendant, then residing in Toronto, a letter which was produced, informing him that the Scanlons living on his farm, were "about to clear out:" that the writer was informed as a secret that they had taken the hay that was stacked in the field and in the barn all away, and that if defendant did not come up immediately and see them, they would be away. The witness said he had observed the place looking as if no person was living on it, and he knew the rent of £50 would be due on the 1st March, 1858, and on this account he wrote to defendant. Another witness also proved the removal of the property from the farm about a week before the rent would fall due. Defendant went to see plaintiff before the arrest, and tried to find him in Bradford, but it did not appear they met. After the arrest they did meet; the plaintiff told defendant he had moved every thing off the place, and defendant might go where he pleased. Plaintiff said he was willing to give his note for any balance of rent, but refused to give defendant any security. The learned judge left the case to the jury, with a direction in the defendant's favour, but they found for plaintiff £30 damages.

D'Arcy Boulton shewed cause.

DRAPER, C. J., delivered the judgment of the court.

I do not find that any objection was taken on the part of the defendant to the manner in which the case was left to the jury, or that an application was made for a non-suit. The jury were rightly directed in defendant's favour, and I think on this evidence they ought to have found for defendant. The plaintiff's conduct obviously shewed he meant to defeat the defendant's remedy by distress for his rent. This fact was communicated to defendant, with an intimation conveying the writer's idea that the tenant was going out of the

country, for that is the common understanding of the phrase used. The defendant seems to have made endeavours to see the plaintiff, but could not succeed, and he found the statement of the removal of the property true. Looking at the whole case I think there should be a new trial without costs.

Rule absolute without costs.

THE TRUSTEES OF THE TORONTO HOSPITAL V. HEWARD.

Common Law Procedure Act, 1856—Equitable pleas.

Upon an action brought for use and occupation, a plea on equitable grounds that the defendant entered upon an agreement (not in writing) for a lease for 42 years, under which no rent was to be paid until certain conditions were performed by plaintiffs, which have never been performed.
Held, upon demurrer to be a good legal defence.

Declaration for use and occupation. Equitable plea: that plaintiffs put defendant in possession on an agreement to give him a lease for 42 years, at £89 2s. rent, that he should build a two-story brick house, and that no rent should be payable except one-half year, when agreement made, until a building called the General Hospital was removed by plaintiffs from lands of theirs close to the part demised to defendant; that defendant entered on such agreement, paid the half year's rent and built the house as agreed, but that plaintiffs have never granted the lease, or removed the hospital building. This plea is demurred to on the ground: 1st. That defendant cannot get the relief he desires at law; and 2ndly, that there is no writing or sufficient contract, or consideration for contract available to defendant at law or equity.

In Easter Term *A. Wilson*, Q. C., supported the declaration, arguing that the plea only alleged a ground for interlocutory relief; that any injunction obtainable must be perpetual; and if defendant filed a bill he must bring money into court, citing *Flight v. Grey*, 4 Jur. N. S. 12.

J. H. Cameron, Q. C., contra, argued that the plea was a good equitable defence; that this would be a perpetual injunction against claiming rent in this shape, citing *Mines Royal Society v. Magnay*, 10 Ex. 489. That at all events it was a good plea at law. *Howard v. Shaw*, 8 M. & W. 118; *Smith v. Eldridge*, 15 C. B. 236; *Flood v. O'Gorman*, 4 Irish L. R., 578.

Wilson, in reply, objected that at law it would be bad, as amounting to the general issue.

DRAPER, C. J.—My first impression was that on this demurrer plaintiffs should have judgment, and that defendant might apply to amend, because I entertained a stronger opinion against the plea as an equitable defence than my learned brothers appear to do. I distrust my own views, however, on a purely equitable question, though I at present think that the Court of Chancery could not grant an absolute unconditional injunction inasmuch as, as soon as the building is removed the rent would become payable, and therefore the duration of the injunction would depend upon a contingency.

I concur in thinking the plea a good legal defence, and I am not not satisfied that where a good defence appears on the whole record we ought to give it the go by.

RICHARDS, J.—I am of opinion that this plea discloses a good legal defence; that it would be open on the special demurrer to the objection that it amounts to the general issue need not on this record, or under the Common Law Procedure Act, be considered. The action for use and occupation is given by the Statute 11 Geo. 2. c. 19, the landlord receives “not the rent, but an equivalent for the rent, a reasonable satisfaction for the use and occupation of the premises,” (*Nash v. Tatlock*, 2 H. Bl. 320), and as laid down in *Comyn’s Landlord and Tenant*, 437, it now appears to be settled that whereas one party occupies by permission of the other in the absence of any contract between the parties, the fact of this one having occupied by the sufferance of the other is sufficient to raise an implied assumpsit by the occupier to pay for his occupation.

The action is based on the occupation, and compensation is payable either in an express or implied contract. Where the express contract is alleged that no rent shall be payable, notwithstanding the occupation, until the performance by the plaintiffs of an act agreed to be done by them, and not yet done, and the plaintiffs admit such to be the contract, I do not see how the action can be maintained. No implication of law can arise to pay rent for an occupation expressly agreed to be

without paying rent. The case is very distinguishable from *Smith v. Eldrige*, (15 C. B. 236), which was a decision on certain facts proved, and not on an admitted agreement, as here. *Howard v. Shaw*, 8 M. & W. 118, supports the view here taken, though it was on an occupation originally taken under contract of sale, but continued after the contract was at an end. *Parke*, B. says: "While the agreement subsisted the defendant was not bound to pay a compensation for the occupation of the land, because the contract shews he was to occupy without compensation, and so long as it subsisted he was entitled so to occupy, but still he was tenant at will." *Alderson*, B.: "While defendant was in possession under the contract for sale, he was tenant at will, under a distinct stipulation that he should be rent free, therefore for that time no action for use and occupation can be brought against him; but when that contract is at an end, he is tenant at will, simply therefore from that time he is to pay for the occupation." *Rumball v. Wright*, 1 C. & P. 589, *Best*, C. J., says: "This defendant is similar to a purchaser, he is not put in as a tenant, but he is put in to occupy till a lease shall be granted, and when the lease is granted then he is liable for rent, and not before."

It appears to me, that in the absence of any express contract to pay, the implied promise to pay a reasonable compensation for the occupation is met by proof that the owner agreed to let defendant occupy rent free. The case cited by Mr. *Cameron*, *Flood v. O'Gorman*, 4 Irish Law Reports, (2 Q. B. 578), very strongly supports this view, which to me seems in accordance with the plainest common sense. In *Woodfall's treatise*, 627, it is said: "this action is founded on a contract, and unless there were a contract express or implied, the action cannot be sustained."

It would be a strange conclusion to declare the defendant liable for rent in a case in which the contract admitted on all sides was, that he was not to pay any.

I feel considerable doubts as to the goodness of the plea on equitable grounds, as I do not find any express decisions that a case in which a court of equity might grant an injunction against an action until one of the parties had done a

particular act, would form a good defence at law on equitable grounds. The last case cited of *Flight v. Grey*, (4 Jurist, N. S. 13, C. B.), does not, though in one point of view possibly in favour of defendant, lead clearly to such a result.

But as I consider the plea discloses a good legal bar, it is unnecessary to discuss this latter point (*Vorley v. Barrett*, 1 C. B. N. S., 225). I do not think the plea open to the objection that a binding contract is not shewn against plaintiffs.

Judgment for defendant.

ARNOLD V. MURGATROYD ET AL.

Held, that the 25th section of the Common Law Procedure Act, 1857, applies to County Courts as well as to the Superior Courts.

Declaration avers the delivery of a *ca. sa.* at plaintiff's suit, from the county court of Wentworth, to the sheriff of Lincoln, against the two first defendants; their arrest and execution of bond by all the defendants to Kingsmill, sheriff of Lincoln, conditioned for the original defendants remaining on the limits, and for their getting that bond, or any bond substituted therefor, to be allowed within 30 days by the judge of the county court, and such allowance endorsed thereon. Breach, that they did not within 30 days get bond, or substituted bond, allowed, &c., according to the Common Law Procedure Act, 1857, and assigned under statute to plaintiff by statute.

A demurrer to this declaration presents the objection that the County Court Amendment Act, of 1857, does not give the power to a county court judge to allow bail; nor were defendants bound to procure such allowance; and that the power of allowance extended only to superior court judges.

In Easter Term the case was argued by *Lawder* for demurrer.

Martin contra.

DRAPER, C. J.—The several clauses of the Common Law Procedure Act of 1856, relative to the payment of a weekly allowance to insolvent debtors, and to gaol limits, and to the discharge of such debtors, are in my opinion in force as

enactments not for the mere purpose of giving certain powers to, and regulating the proceedings in such cases in the superior courts, but to provide specially for a class of debtors their relief or discharge from custody by all courts under whose process they are in custody. The language used in sec. 295: "it shall be lawful for the court from which the process against such debtor issued, or any judge having authority to dispose of matters arising in such court, to make a rule or order, &c." Similar general language respecting the court or a judge in secs. 296-7, 300, 302, 303, and other sections, I think amply warrant the conclusion that the legislature contemplated the applications of these provisions to *all* debtors coming within the definition, without intending to confine them to debtors against whom process from the superior courts should be issued. It is true, these provisions are expressly extended to the county courts by the County Courts Procedure Act, 1856. This act, however, extended to the courts a great many provisions of the Common Law Procedure Act, 1856, which otherwise confessedly would not extend to them; and it also includes in such extension the particular sections under discussion. I do not think this is to be construed as shewing that without such extension they would not have applied to the county courts, but rather as proceeding *ex majore cantela*, and to avoid doubt.

But there seems to me even less reason to doubt, in regard to the Common Law Procedure Act, 1857. The 25th section enacts that in *all* cases in which the sheriff of any county shall take from any debtor confined in the gaol a bond under the provisions of the Common Law Procedure Act, 1856, &c. The language used in this section, cannot, I think, be confined to the superior courts without a forced construction narrowing its generality, and if this be the correct view, it further furnishes a key to the meaning of the legislature, in the provisions of the former act, and strengthens the conclusion of its general application to all courts issuing the particular process there referred to.

I feel no doubt but that the 25th section of the Common Law Procedure Act, 1857, does extend to suits in the county court, and therefore that our judgment should be for the plaintiff on this demurrer.

HAGARTY, J.—The point seems very simple. Section 302 of Common Law Procedure Act, 1856, directs the taking of a bond by the sheriff, without any provisions as to the 30 days. This section is expressly extended to county courts by the Common Law Procedure Act, 1856.

By section 25, of the Common Law Procedure Act, 1857, it is enacted that in all cases in which the sheriff of any county shall take a bond from any debtor under the 302 section of the Common Law Procedure Act, 1856, the bond shall contain the further conditions as to the allowance within 30 days by the judge of the county court where the debtor is confined. The 32 section declaring what clauses of the last act shall apply to county courts, omits to give this 25th section. But it appears very clear that the amendment to the original section 302, is of a general nature, applicable to all courts to which that section applies, and as the county courts are expressly ruled by the section in question, we are bound to consider that the legislature designed to extend this reasonable amendment of the law to every case in every court, to which the original clause extended.

PATTERSON V. THE GREAT WESTERN RAILWAY COMPANY.

Damages—Continuing.

The defendants, in the construction of their railway, crossed a stream of water which emptied itself on the plaintiff's land. And to allow a passage, they built a culvert, and caused the water to flow as before on to plaintiff's land, none of which, however, was taken for railway purposes. The culvert being filled, the defendants caused, about six years before the bringing this action, a drain to be dug, which, with continuations made by the adjoining owners of property, caused the water to be diverted from its natural course and to *overflow* a portion of the plaintiff's land—and instead of being a benefit, became an injury. The plaintiff waited for six years and then brought an action—claiming damages for a crop injured at the time of the diversion, and as a continuing injury to the land since.

Held, that the damage was not continuing, and that the action should have been brought within six months.

DECLARATION, dated 18th September, 1857. First count. That plaintiff is lawfully possessed of a certain farm, and is entitled to the use of the water of a stream which ought to flow from another farm, to plaintiff's farm, and into a pond thereon, to water plaintiff's cattle; yet defendants, by cut-

ting a ditch across the stream near plaintiff's farm, on 1st January, 1854, and thence hitherto wrongfully diverted the water of the stream, by means whereof, &c. Second count,—that plaintiff is lawfully possessed of a farm, and theretofore the water of a stream flowed from another farm into a pond on plaintiff's land, from which the water escaped by underground passages from plaintiff's farm, without overflowing or injuring the same; yet defendants, by cutting a ditch across the stream near plaintiff's farm, wrongfully diverted the water from the said pond into another ditch theretofore made by defendants, and by means of the said ditches, wrongfully conveyed the water past, and from the pool to a place near the plaintiff's farm, without providing a sufficient ditch for the water to flow from such place, by means whereof the water hath overflowed plaintiff's farm, and soaked into the same, and the land has been injured, and the crops spoiled.

Pleas, Not guilty by statutes 4 Wm. IV., ch. 29, sec. 26; 16 Vic., c. 99, s. 10, 18 Vic., ch. 176, sec. 26.

The case was tried at Brantford in October last, before *Burns, J.* It appeared that the plaintiff has been upwards of 20 years in possession as owner of a lot of land, the north-west corner of which just touches the land taken by the defendants for the construction of their railway, which runs to the north of plaintiff. There were too large springs on the land, north of the railway land, the water from which ran into a pond at the north-west corner of plaintiff's land, and disappeared in the gravel soil there. When the defendants constructed their railway they made a culvert under it, through which the water flowed, but the culvert was deeper than the channel along which the water had previously flowed from the springs, and it no longer went on to plaintiff's land. The plaintiff complained, and by some means the water was let into the pond again. But as the water filled the culvert, the defendants, about six years before the trial, dug a ditch along their own land to endeavour to let it off. One Culp owned the lot immediately west of the plaintiff's on both sides of the railway, and one Smith the land opposite plaintiff's, and directly north of the railway. Both

their lands were wet, and to drain them, Smith got Culp's consent, and dug a ditch just within Culp's land, close to the plaintiff's lot, from a point a little (a rod and a half) south of the railway track, but not reaching it, for a considerable distance south, till it reached a spot where the land was low. This was done before 1854. The defendant (Culp not objecting) connected this long ditch with the ditch on their land, and thus the water was diverted from the pond, which according to Smith's evidence, it had reached, after the construction of the culvert, by first overflowing his (Smith's) land. The plaintiff claimed damages for this diversion. The water which flowed through the ditch on Culp's land, when it reached the end of the ditch, spread itself and partly went on to plaintiff's land, and damaged about an acre and a half of it, on which, in 1854, there was a crop of peas, and in the fall of 1856 wheat was sown. In 1857 the ditch was carried on to the highway, and the water no longer spread over plaintiff's land. The crops in 1854 belonged to the plaintiff, but not in 1856-7. For the defence it was contended, that the diversion of the water was caused by the construction of the railway, and therefore could not now be sued for; that if it arose from the ditches cut in 1854, the action should have been brought for the injury within six months. For the plaintiff it was answered, it was a continuing injury, and might be brought from six months to six months. Leave was reserved to defendants to move to enter a non-suit if plaintiffs could not recover. The jury found that the water was not diverted by the construction of the culvert, but by the digging of the ditches in 1854, by the defendants, and gave the plaintiff £50 damages. It appeared there had been a view of the premises, though not by the whole jury.

In Michaelmas Term, *M. C. Cameron* obtained a rule *nisi* to enter a non-suit on the leave reserved, or for a new trial on the law and evidence, and for misdirection in this, that the jury were told the defendants were liable notwithstanding the act complained of in the declaration was committed more than six months before the commencement of this suit, and for excessive damages.

O'Reilly, Q. C., shewed cause, contending that the deprivation of the water was a continuing injury, as well as the overflowing the land—that it was the damage flowing from defendants' acts that gave the action, and not the acts themselves, and therefore the action might be brought. He referred to this as the true construction of the 10th section of 16 Vic., ch. 99, and as upheld by *Snure v. Great Western Railway Company*, 13 Q. B. U. C. 376; *Wismer v. G. W. Railway Co.*, ib., 383; *Moison v. G. W. R. W. Company*, 14 U. C. Q. B., 109.

M. C. Cameron contra. If the water had been wholly diverted from plaintiff's land, in the original construction of the railway, it would have formed part of plaintiff's claim for damages at that time, and must have been then compensated for. It was however diverted by an act done afterwards, and being an act complete and final, it caused at once an injury capable of a single satisfaction, for which the action should have been brought within six months from the damage so sustained. As to the overflowing plaintiff's land, the ditch which led the water to where this injury was sustained was dug by another person, for whose acts the defendants are not responsible. At all events the plaintiff is only entitled to the damage to the crop of peas, and the whole injury was removed in April, 1857, before the trial. Then the damages are excessive, for if plaintiff could recover for the diversion of the water, he ought to be limited to six months before action brought. But he has no right to recover for that injury at all, and the whole value of an acre and a half of peas, would be far less than £50, and it is not pretended the crop was destroyed, nor is there any estimate given of the extent of injury. He cited *Knapp v. G. W. R. Co.*, 6 C. P. U. C. 187, and *Carron v. G. W. R. W. Co.* 14 Q. B. U. C., 192.

DRAPER, C. J.—The act of the defendants complained off in the first count was only wrongful to the plaintiff by reason of the injury and damage it occasioned to him. It was either done on their own land or on the land of another party, who did not object to it, as it was advantageous to him. It

appears the defendants did not take any of plaintiff's land for their railway purposes, but that the land they did take just touched the plaintiff's land at one corner.

It further appears that the water was completely diverted from plaintiff's land, when defendants cut the ditches complained of, before the year 1854. No new act of this character has been done, and the act itself may be rightly considered permanent, and perhaps, so far as their (defendants') interests are concerned, necessary for the proper enjoyment and use of their railway. The injury or damage is also in one sense of an abiding and continuing character, constituting a permanent loss, and diminution in value of the plaintiff's land.

It does not appear from the learned judges notes, that the plaintiff limited his claim to damages under this count to the six months next before the commencement of this suit. He insisted, and renewed the argument before us, that the injury was continuing, and that he could go back to the time of its infliction, to commence the estimate of damages.

This right he claims, as not interfered with by the 10th section of 16 Vic., c. 99: "that all suits for indemnity for any damage or injury sustained by any person or persons whomsoever, by reason of the said railway, shall be instituted within six calendar months after the time of such supposed damage sustained, or if there shall be a continuation of damage, then within six calendar months next after the doing or committing such damage shall cease, and not afterwards."

In *Snure v. G. W. R. Co.* (13 Q. B. U. C., 376), the Court of Queen's Bench in this province held that the effect of this latter alternative is to save the right of action for the whole damage where the suit is brought, within six months after the injury has ceased, and that the action is saved as to all the damages so long as the injury continues, subject, of course, as I understand, to the effect of the general statute of limitations.

In this case the injury continues just as it did when inflicted. The ditch dug by the defendants, so far as the evidence shews, is the same as at first; the diverting the

water of the springs has been the consequence of that act, and will be as long as the ditch continues open, or at least until some special means are adopted to convey the water again to the plaintiff's land from these springs.

The plaintiff might have brought an action immediately after the water was diverted. For though the act of the defendants was no trespass, at least as to him, still it produced at once the same injury to him that it has ever since continued to do. Damage was sustained then, and the doing or committing that damage has not ceased up to the bringing of this action.

Even if an action were maintainable for the damages accruing within six months next before the bringing such action, yet I think under the circumstances of this case it would be limited to that period. The verdict in that case, as regards the first count, would be larger than the strongest evidence in his favour would warrant.

I have, however, arrived at the conclusion, that for this injury the action should have been brought within six months of the time of the damage first sustained. I look upon the injury as permanent, as occasioning an immediate diminution in the value of the selling price of his farm, and therefore capable of a full compensation at once, just as if the plaintiff having a right of access to water his cattle on the land of his neighbour, was deprived of the power of exercising it, by the construction of the railway between his own land, and the springs or streams which were the watering place. Causes of action such as this, and the one set forth in the second count are distinguishable, the first depriving the plaintiff of that which constitutes a part of the actual value of his real estate, the latter being an interference with the use and enjoyment of a small part of the land itself, or causing injury to a particular crop, and which either determines with the infliction of the particular loss, or ceases shortly altogether. Though both injuries in this case arose primarily from the same act, that of cutting the ditch which prevented the water from reaching and forming the pond in one corner of the plaintiff's land, the character and consequences are widely different. The former has a certain definite extent and effect, capable of immediate and complete estimation in

its effect on the value of the farm; the latter may vary according to the season, the quantity of water flowing on to the plaintiff's land, and the use to which he is putting it. There may be seasons when it will cause no injury whatever.

As to the second count, I think there can be no doubt that the damage to the crop of peas sown and reaped in the year 1854, should have been sued for within six months after that damage arose. As to that, there was no continuance of damage, and I rather think from the evidence, that at the time it happened it was considered of too insignificant a character to be worth the trouble and expense of a law suit.

In my opinion the rule for entering a non-suit should be made absolute.

The Chief Justice referred to the following cases: Fetter v. Beale 1 Salk. 11; Clegg v. Dearden, 12 Q. B. 576; Nicklin v. Williams, 10 Exch. 259; Hochster v. De LaTour, 2 E. & B. 678; Hanbury v. Ireland, Cro. Jac. 618; Wythers v. Henley, Cro. Jac. 379; Holmes v. Wilson, 10 A. & E. 503; Hudson v. Nicholson, 5 M. & W. 437; Thompson v. Gibson, 7 M. & W. 456; Roberts v. Read, 16 Ea. 215; Wordsworth v. Harley, 1 B. & Ad. 391; Lord Oakley v. Kenington Canal Company, 5 B. & Ad. 138.

WALKER V. FAIRFIELD.

Sheriff's fees—Poundage.

Where a levy had been made by a sheriff under a writ of *feri facias*, but before a sale the writ and all proceedings thereon were set aside. *Held*, that the sheriff was not entitled to poundage.

A writ of *fi. fa.* against the goods of the defendant in this cause was put into the hands of the sheriff of Perth, indorsed to levy £919 14s. 5d. damages, and £3 13s. 6d. costs, with interest, costs of writ, sheriff's fees, poundage, and incidental expenses. The sheriff seized the goods and stock in hand of the defendant to an amount sufficient to satisfy the writ, made an inventory, and advertised the sale; among the things seized there was the sum of £43 12s. 4½d. in cash. The sheriff held the goods twenty-seven days, and had persons in charge. Before any sale the writ of *fi. fa.* was set aside with costs, and the sheriff was directed to withdraw from possession, and redeliver the goods, and all money, notes or other securities

which he might have seized. The sheriff did so, and rendered the following account for his fees :

“STRATFORD, 1857.

“JACOB F. PRINGLE, Esq., to R. MODERWELL, Sheriff, C.P

“*In the Common Pleas—Fi. fa. in assumpsit—Walker v. Fairfield.*

“Sept. 17, filing writ, 1s. 3d., return, 2s. 6d. ...	£	0	3	9
Warrant to bailiff, 2s. 6d., 13 miles				
travel to seize, 6s. 6d.....	0	9	0	
Schedule and copy 100 folios of 100				
words each	12	10	0	
Advertising property for sale.....	0	2	6	
Three postponements of sale by order				
of court.....	0	3	9	
Paid for assistance, 3 days to pack				
up goods.....	1	10	0	
For keeping possession and taking				
care of property seized and adver-				
tised, 27 days @ 10s.....	13	10	0	
Poundage, amount endorsed on <i>fi. fa.</i>				
£924 9s. 2d.....	25	12	4	
	<hr/>			
	£54	1	4	

To the plaintiff's attorney, which account he swore truly represented the actual service and disbursements made, and the amount of poundage.

This bill was referred to the Master for taxation. He taxed off 2s. 6d. for the return, £9 17s. 6d. for the charge for schedule and copy, £6 15s. from the charge for keeping possession, and the whole of the poundage.

The matter is brought before the court on a rule to revise taxation, obtained by *C. Robinson* on behalf of the sheriff.

A. Wilson shewed cause.

DRAPER, C. J., delivered the judgment of the court.

The matter most in question is the poundage. The words in our tariff are : “Poundage on executions, and on attachments in the nature of executions *where the sum made* shall not exceed £100, five per cent., where it exceeds £100, and is less than £1000, five per cent for the first £100, and two and a half per cent for the residue.” In *Morris v.*

Boulton, Mr. Justice *Burns* held, under the then existing tariff, which contains the words "levied and," in addition to the word "made," that if the money be paid before the taking the goods in execution, it defeats the sheriff's right to poundage; but if the money be forced by the act of the sheriff, though it does not pass through his hands, his right to poundage accrues. Here the writ has been set aside for irregularity, but that is the plaintiff's fault. The sheriff has levied, done all prior to a sale, has incurred all responsibility, but unfortunately no money has been *made*, and though the case has a hard bearing on the officer, I do not see that we can help him, without violating the express terms of the tariff, and allow the sheriff poundage. As to the other items the Master appears to have strictly followed the tariff.

PARTRIDGE V. THE GREAT WESTERN RAILWAY COMPANY.

Railway—Damages—Mandamus.

Held, that a purchaser of land is not entitled to damages for an injury committed (by the construction of a railway through the land) prior to the time of his becoming possessed, and a mandamus to compel the railway company to appoint an arbitrator to assess such damages, was refused.

Albert Prince obtained a rule *nisi* in the Practice Court in Trinity Term last, calling on the Great Western Railway Company to shew cause why a writ of mandamus should not issue commanding them to appoint an arbitrator or arbitrators who, with the arbitrator appointed by Partridge, shall award the sums of money which the Company shall pay the person or persons entitled to recover the same for the undivided interest of Partridge in lot No. 3, 1st concession from the river Thames, township of Howard, or such part thereof as has been taken by the Company for purposes connected with their road; and all damages which the said persons may be entitled to receive from the Company in consequence of the construction of the railway across the lot.

In Michaelmas Term this rule was enlarged before the full court; and in Hilary Term *Gwynne*, Q. C., shewed cause.

DRAPER, C. J., delivered the judgment of the court.

All parties interested claim under Frederick Arnold, who

died in 1811 or 1812, and by will dated 10th February, 1807, devised the lot mentioned in the rule *nisi* to his two sons, Christopher and Frederick (excepting two acres), as tenants in common in fee. Frederick the devisee lived on the lot some time, and died on other property of his own in 1823, intestate, leaving four daughters, Ann, Eve, Sarah, and Louisa. Ann married first one Hartley, by whom she had two daughters, Mary Jane, and Elizabeth Ann, and after Hartley's death she married one Woods, by whom she had a daughter Maria. Ann died leaving her three daughters her survivors. They are all living; Mary Jane is married to one Jeremiah H. Lockhart; Elizabeth Ann married one Brush, since dead, and she is now a widow. Maria married one Thomas Evans, when and where does not appear. A sentence or decree of the district court of the 8th judicial court of the State of California was put in, to establish that she had been divorced from her husband. William Partridge, who applies for this mandamus has conveyances from Jeremiah H. Lockhart, and Mary Jane his wife, from Elizabeth Ann Brush, and from Thomas Evans, and Maria his wife, describing her right and estate in very general terms; and a second containing a more specific description from *Maria Woods*, dated since the decree for her divorce above referred to. Eve, the second daughter of Frederick, married in 1832 one Ingalls, and they are both living. Sarah, the third daughter of Frederick, in 1833 married one Lamond, and they are both living. Louisa, the fourth daughter of Frederick married one Beardsley, she and her husband are living in the State of Michigan, but she claims to have been divorced from her husband by the laws of that State. In an ejectment brought last year, the Court of Queen's Bench decided, that Ingalls and Eve his wife, Lamond and Sarah his wife, Lockhart and Mary Jane his wife, and Elizabeth Ann Brush, were entitled as against those claiming under Christopher Arnold, the devisee above named, to recover an undivided fourth part among them, of the premises devised. There must, I think, be some error in the report of the judgment, since Frederick took an undivided moiety of the whole as joint tenant with his brother Christopher, and on his death

intestate, each of his four daughters took an undivided fourth part of his moiety, or undivided eighth part of the whole; Louisa, the fourth daughter of Frederick did not join in that action; nor did Maria, one of the daughters of Ann, and therefore only the undivided portions of the daughters Eve and Sarah, and two third parts of the undivided portion of Ann, the eldest daughter of Frederick, were in question. For the present purpose, the decision is important only as shewing that there has been no partition of undivided moieties devised by the will of 1807, to Christopher and Frederick Arnold, and therefore that the interest of Partridge, the applicant for this mandamus, is as tenant in common of that undivided eighth part of the whole property, which belonged to Ann, eldest daughter of Frederick the devisee.

The case before us, in the abstract from the registry office, and the admissions, also traces the title to the other undivided moiety, that which devised to Christopher. I do not see that for the purposes of this rule we are called upon to investigate the very condensed abstract, or the statement of facts submitted, in order to ascertain who are entitled to this moiety; none of the parties are before us on this application, nor has Partridge, that I can see, any right to represent them.

It is shewn upon the plan, and is also stated among other admissions, that at the time the Great Western Railway Company got possession, and made arrangements with the several occupiers of this lot No. 3, one William Roe was in possession as owner of the east part of this lot, and his right has since become vested in one Langford.

I do not gather from the papers before us that there ever has been a partition, or a conveyance from all the tenants in common at any one particular time, of the part so possessed by Roe.

Christopher Arnold, the devisee, made a deed of gift, dated the 13th August, 1834, and registered the 21st of the same month, to his son David in fee, of "*the half of No. 3, in the 1st concession of Howard.*" All he had at that time was an undivided moiety of that lot, as co-devisee with his brother Frederick. By his last will dated 7th April, 1844,

but not registered, as far as appears, he devised to his wife "Pauline" all his real and personal estate and property for life, at her decease to be divided equally amongst his children in fee, thus making them tenants in common. Christopher's eldest son and heir-at-law was named Frederick, and it appears by the abstract of his will dated 11th February, 1851, that among other things he devised to his brother Jacob in fee, a part of No. 3 & 4, 1st concession, Howard, as deeded to him by the late Christopher Arnold, deceased (I presume his father.) The time of the death of Christopher is not stated. It must have been before 11th February, 1851, from the contents of this will. I see no other reference to the deed from Christopher to Frederick, than that mentioned in this will. A deed is produced, dated 30th December, 1850. Frederick Arnold conveys to Pauline Arnold, during the space of her natural life, and after her decease to Solan Field Arnold. William Warren Arnold, and Anna Jane Arnold, the rightful heirs of Pauline Arnold by her late husband David Arnold for ever, 192 acres, part of No. 3, *front* concession Howard, particularly described, commencing on the limits between 2 and 3. On the same, 30th December, 1850, Frederick Arnold conveys to Christopher Arnold (whom I take to be his brother, as it appears from the admissions he had a brother so named, and because I find Christopher was a defendant in the ejectment spoken of) 112 acres of this same lot, No. 3, and from the description it seems to have been land lying between lands belonging to Jacob Arnold and Pauline Arnold. So it would seem that notwithstanding the deed to David of the 13th August, 1834, Frederick, his elder brother, assumed to convey all lot No. 3 by the two deeds of 30th December, 1850, and his will of 11th February, 1851, which was registered 10th May, 1851, excepting two small portions sold off (about 5 acres) many years before.

The last paragraph of the admission states that Partridge claims one undivided 8th part. That Ingalls and Eve his wife claim one other undivided 8th part. That Lamond and Sarah his wife claim one other undivided 8th part. That Louisa Beardsley claims one other undivided 8th part,

claiming as a *femme sole* by virtue of some unproved divorce. That Pauline Arnold, and her three children by David Arnold, claim three sixth parts, and each party claims the like interest in the several portions or strips of the lot occupied by the Railway Company. And that all these interests of the different parties are as yet undivided shares.

Pauline's claim of three-sixths or one-half, assumes that by the conveyance from Christopher, the first devisee, to her husband David, all the interest that Christopher had in this lot, as tenant in common with his brother Frederick, and afterwards with the co-heiresses of his brother Frederick, passed. Looking at the case in the Queen's Bench, at pp. 298, 9, it is probable Christopher was then acting on the idea that he and his brother Frederick had been joint tenants, and that he took the whole by survivorship, and thought that he was conveying an undivided moiety of the whole lot, still retaining or perhaps having then conveyed to his son Frederick the other undivided moiety. But it is decided by the Court of Queen's Bench that Christopher was not a joint tenant, and therefore at the date of the deed to David, he had only an undivided moiety.

Whether under all the circumstances that deed passed the undivided moiety, or a moiety of it only, is a question, I apprehend, which Partridge the present applicant has no right to raise, at all events not in this proceeding, and in the absence of Pauline and her children. We have no proof either of the date or particular language of the deed referred to in the will of Frederick. It does not appear to have been registered. Nor was the will of Frederick Arnold, the grantee of the crown, registered, so it is possible that if there be a deed from Christopher the devisee, to Frederick his eldest son, anterior in date to the deed to David, and conveying by the same words the "half of lot 3, 1st concession, Howard," that nothing passed by the deed to David; but that the claim of Pauline Arnold and her children would be cut down to an undivided moiety of the 192 acres conveyed to her by Frederick, her husband's brother, and Christopher Arnold, and the parties claiming under Jacob would have an

undivided interest in their respective parts of No. 3, which they hold and occupy.

On the part of the Great Western Railway Company it was shewn that Pauline Arnold, on the 8th June, 1851, entered into an agreement under seal to convey to the Company such portion of the west-half of lot No. 3 as might be required for the right of way of said railway, for the sum of £2 10s. That on the same day Christopher Arnold entered into an agreement under seal to convey to the Company such portion of the middle part of the same lot as might be required for the said right of way for the sum of five shillings. That after the making of these agreements the Company entered by virtue thereof and constructed their railway across the said lot.

The rule *nisi* for a mandamus was obtained on an affidavit of William Partridge, stating that he is the owner in fee of one undivided eighth part of No. 3, 1st concession from the river Thames, in the township of Howard. That the Great Western Railway, in 1852, constructed their road on and across that lot, and still use it. That when the Company took possession the title to this land was in dispute, but that dispute has been settled by the Court of Queen's Bench in Trinity Term, 1856.

That negotiations have been ineffectually pending for a settlement of the claims of the persons entitled to the property, for the land taken, and for damages caused by the construction of the railway, and therefore notice of the appointment of an arbitrator, and for the Company to appoint one, was served, but they had made no appointment.

Partridge, the applicant sets up, that by conveyance made in 1856, he has a right to demand, as owner of an undivided portion of lot 3, 1st concession from the Thames, in the township of Howard, from the Great Western Railway Company, compensation for such parts of this lot as they took possession of in 1852, constructing their railway thereon, and damages resulting to the lot, the result of the railway being carried through it, limiting his demand to a proportion of the value and damages, corresponding with his interest in the whole of the estate.

His claim is derived exclusively from and under the three daughters of Ann. The eldest daughter of Frederick Arnold, one of the two tenants in common by devise from Frederick Arnold, the elder. Whether he sustains his claim to this extent depends on the effect of the deed to him from Thomas Evans, and Maria his wife, the language of which is so general as to have made it prudent in Partridge's own estimation, to obtain a second deed from Maria, by her maiden name, Maria Woods, she having been, as is stated, divorced from her husband by a decree or judgment of a court of the State of California.

In 1851, the Great Western Railway Company agreed with Pauline Arnold, and Christopher Arnold, for the purchase of certain portions of this lot, on which they were constructing the railway. I understand that at the time of these agreements Pauline and Christopher Arnold were in the actual possession of certain parts of the lot, and were dealt with as such possessors or occupants by the Railway Company.

This action of ejectment, which is brought under our notice in this application, shews that the parties under whom Partridge claims, were then out of possession, and that their right and title was denied. The railway was constructed, and the land taken and damages done, for which compensation is now claimed; in 1852, some four years before the applicant had acquired any interest in the property, and at least as much as two years before those under whom he claims brought their action of ejectment. He shews a clear paper title to two-thirds, or one-eighth of the lot formerly belonging to Frederick Arnold, the elder, and a claim to the remaining one-third of this one-eighth, depending on a deed from Thomas Evans and his wife, couched in terms so general as to have raised a doubt in his own mind of its sufficiency, for he has obtained a second deed sufficient in language and description of premises to pass the property, but executed by Maria Evans alone, under the name of Maria Woods, as she asserts she has been divorced from Evans by the sentence of a foreign tribunal. Whether that sentence is one which would alter her status as a married woman, according to the laws

of the province, we have not the information necessary to enable us to determine.

I am not prepared to say whether a mandamus ought or ought not to be granted, to assess compensation by a reference to arbitration, by piecemeal; or whether the court, in the exercise of a sound discretion would not require all the parties having legal claims to join, so that there might be one final settlement. There may be cases in which the former course would be extremely vexatious and harassing, and others in which the latter would possibly amount to a denial of justice, though I think the Railway Company have the means of protecting themselves under the acts. In my view, however, it is not necessary to decide the question now.

I am of opinion we should refuse this rule, on the ground that the applicant, Partridge, was not the owner, nor in any way interested in the lands, respecting which he makes his claim. He has purchased long since. Whether the right to the land on which the railway is constructed passed to him or not, I think no right to mere damages passed—nothing which is in the nature merely of a chose in action. If the land is his, he has other remedies, and I do not think that a case such as he presents, is one for the court to decide upon on an application for the writ of mandamus.

Rule discharged.

WYATT V. THE BANK OF TORONTO.

SPECIAL CASE.

Vendor—Lien—Assignment.

One D. McD. being the owner in fee of certain land, sold and conveyed the timber and cordwood thereon to A. A. McG., who took possession, giving his promissory note as part payment of the purchase money; he then converted the timber into cordwood and sold it to one S., and afterwards absconded. On the 8th of September, 1857, the defendants in this action recovered a judgment against McG. and placed a writ of *feri facias* in the sheriff's hands, who levied on the cordwood, McD's. assignees (he having in the mean time made an assignment) claiming a lien upon it for the unpaid purchase money, and on the 18th November, 1857, advertised and sold it by public auction to the plaintiff.

Held, that McD. had absolutely parted with his lien, and that the sale was invalid.

The facts as stated for the opinion of the court were as follows :

Before judgment was recovered or execution issued by the

Bank of Toronto as hereafter mentioned, on the 24th day of June, A.D. 1857, one Duncan McDonell was the owner in fee of certain lands in the county of York, having thereon a quantity of growing trees and fallen pine timber, and on that day sold the said growing trees and fallen pine timber to one A. A. McGaffey, the defendant in the execution hereinafter mentioned, and received his promissory note for £250, at two months from the said 25th of May, 1857, for the price thereof. The said McGaffey thereupon cut down the said growing trees and converted them, together with the fallen timber, into cordwood. And when the said note became due the portion of the said cordwood now in dispute, together with a large quantity besides, was piled on the said land of the said Duncan McDonell. The said McGaffey having sold and delivered to divers persons some portions of the said cordwood, afterwards absconded from this province, and being then and still absent therefrom as an absconding debtor, the said wood unsold and now in dispute, so remained on the land of the said Duncan McDonell, until and after default had been made in payment of the said note so given for the price thereof as aforesaid. That the said McGaffey became, and still is, an insolvent and absconding debtor. That neither he nor any one on his behalf paid the said note or the price of the said cordwood. That on the 10th of October, 1857, the said Duncan McDonell assigned the said land and note, and his interest in the said cordwood (if he had any) to T. D. Harris and Thomas Woodside, as trustees for the benefit of his creditors, and that assignment is still in force. That one Henry Searls claimed the said cordwood as the purchaser thereof from the said A. A. McGaffey. That the said Duncan McDonell and his assigns caused a notice in the words and figures following to be personally served on the said Searls, who was then claiming to own the said cordwood, that is to say :

“TO HENRY R. SEARLS, AND ALL WHOM IT MAY CONCERN.

“Take notice that all the cordwood and hewn timber cut and now situate on lots 39 and 40 in the second concession from the Bay in the Township of York (except what may be

on the 20 acres thereof adjoining the dwelling house on the said land) was sold by Duncan McDonell to Albert A. McGaffey, and there is still a balance of £250 and interest, part of the purchase money of the said timber and cordwood past due and still unpaid. And take notice further, that after the said balance purchase money had become due, and while it was unpaid, the said Duncan McDonell assigned his interest therein and in the said land to Thomas Dennie Harris and Thomas Woodside of the City of Toronto, as assignees for the benefit of his creditors. And take notice further, that the said assignees hereby claim to stop and keep the said cordwood and hewn timber in their possession until the said balance purchase money shall have been paid. And take further notice that unless the said balance purchase money shall be paid before the expiration of six days from the service on you of this notice the said assignees will cause the said timber and cordwood to be put up for sale by public auction on the said premises, and the same or a competent portion thereof will be sold at such auction on account of the purchaser, the said Albert A. McGaffey. And the proceeds of such sale or a competent portion thereof will be applied towards the payment of said balance purchase money. And take further notice that in case you remove or attempt to remove the said cordwood and timber or any part thereof until the said balance purchase money shall have been paid or satisfied you will be held personally liable to the said assignees and the said Duncan McDonell for the said balance purchase money. “Yours, &c.

“MCDONALD & BRO.

“*Solicitors for the said Assignees and
the said Duncan McDonell.*

“Toronto, 21st October, 1857.”

That in pursuance of the said notice the said cordwood in dispute was duly advertised for sale, and on the 18th of November, 1857, was duly sold by auction on the said land to George H. Wyatt the plaintiff, as the highest bidder, and he gave his promissory note for the same to the said assignees in pursuance of the conditions of sale for the sum of £250. That the said promissory note so held by the said assignees covers the original purchase money of the said cordwood in dispute, together with interest thereon and no more. That the defendants recovered a judgment against the said A. A. McGaffey and

placed the writ of *feri facias* in the hands of the sheriff of the United Counties of York and Peel against the goods and chattels of the said A. A. McGaffey on the 8th of September, 1857.

That the sheriff under the said writ levied upon the cordwood now in dispute on the said land as well as the residue not in dispute after the said George H. Wyatt had removed a small portion of what had been purchased by him as aforesaid off the said land, and it was then mutually agreed, between the said assignees and the said George H. Wyatt and the defendants, that the note which he had given to the said assignees for the said purchase money, should be delivered to the said sheriff, and that a special case should be stated for the opinion of the court, to determine whether the said cordwood was or was not the property of the said A. A. McGaffey, and liable to the execution of the defendants on the 8th September, 1857, subject to the original vendor's lien for unpaid purchase money, and in fact whether the said Duncan McDonell or his said assignees ever had any lien on, or any right to sell, the same. The question therefore for the opinion of the court is, whether the said Duncan McDonell or his said assignees ever had any lien for the said unpaid purchase money secured as aforesaid by the said A. A. McGaffey's note.

McDonald for plaintiff, cited *Bloxom v. Sanders*, 4 B. & C. 941; *Valpy v. Oakley*, 16 Q. B. 941; *Addison on Contracts*, 260, 263, 264; *Wentworth v. Outhwaite*, 10 M. & W. 452.

J. H. Cameron, Q. C., for defendants, referred to *Gibson v. Carruthers*, 8 M. & W. 321.

DRAPER, C. J., delivered the judgment of the court.

This case raises the question only of the actual right of property in certain fallen timber and growing trees sold by Duncan McDonell to one A. A. McGaffey. McDonell was seised in fee of the land on which the fallen timber was lying and the trees were growing; he sold to McGaffey and took his promissory note at two months for the agreed price, £250. McGaffey thereupon cut down the growing

trees and made them and the fallen timber into cordwood, and when the promissory note fell due a portion of this cordwood was still upon McDonell's land. The note was dishonoured and remains unpaid, and McGaffey has absconded and left the province. McGaffey, it is said, sold the cordwood so lying on McDonell's land to one Searls. McDonell made an assignment of his effects to trustees, including McGaffey's note, and McDonell's right (if any) to this cordwood, and the assignees gave Searls notice that they claimed to stop, and hold it, till the purchase money and interest was paid, and that if, by a named day, he did not pay they would sell it, and as Searls paid nothing they did sell it by auction, and plaintiff became the purchaser, giving his note for £250 as the price. This sale took place on the 18th November, 1857. The defendants recovered a judgment against McGaffey, and put a *feri facias* against goods into the sheriff's hands on the 8th September, 1857.

After the sale to plaintiff, it was suggested that some residue of the cordwood (I presume not included in the sale to plaintiff) was still McGaffey's property, and the sheriff under the *feri facias* levied, as well upon that residue, as upon the cordwood, or the remaining part of it, which plaintiff had bought, and this action is instituted to try whether the cordwood was the property of McGaffey, and liable to defendants' execution, upon the 8th September, 1857, whether it was subject to any lien in favour of McDonell or his assignees for the unpaid purchase money, and whether, in fact, they ever had any lien or right to sell the same.

I am clearly of opinion with the defendants. The facts shew a complete parting with the possession of the trees and fallen timber by McDonell, and a complete delivery to McGaffey. And after the delivery he alters the character of the things purchased by cutting up the whole into cordwood. This act was, it appears to me, sufficient to vest an unequivocal possession in the purchaser, and after that I do not understand upon what pretext it is that McDonell or his assignees could sell the cordwood as his (McDonell's) property, or on the claim of a lien for the purchase money. There can be no right of lien without possession of the

chattel, and if the possession be parted with the right of lien is parted with also. We were referred to the case of *Mitchell v. McGaffey*, 6 Grant, but it does not touch this question; it rests upon the well known doctrine of the right of the vendor, where no rights of third parties are affected, having a lien on the estate sold for his purchase money. We abstain from expressing any opinion as to the validity of the sale by McGaffey.

The Chief Justice referred to the following cases:—*Bunney v. Pointz*, 4 B. & Ad. 568; *Miles v. Gorton*, 2 C. & M. 512; *Edwards v. Brewer*, 2 M. & W. 375; *Ellis v. Hunt*, 3 T. R. 464; *Wright v. Lawes*, 4 Esp., 82; *Sloveld v. Hughes*, 14 Ex. 308; *James v. Guffin*, 2 M. & W. 632; *Blenkinsop v. Clayton*, 7 Taunt., 597; *Milgate v. Kebble*, 3 M. & Gr. 100; *Dodsley v. Varley*, 12 Ad. & E. 632.

MOORE V. POWER.

Devise—Sale.

A testator devised as follows: "I give and bequeath to my wife after my decease the proceeds of one half of all my lands, cattle and other effects of every kind whatsoever to me belonging at the time of my decease, and the other half of my said lands, cattle and effects of every kind whatever, I leave in the hands of my executrix and executors, to pay all my just debts," &c.

Held, that a power of sale, and not the fee, passed to the executors.

This was an action of ejectment tried before *Richards*,^q J., at the last fall assizes for 1857, held for the county of Prince Edward. It was brought by the brother of the testator on the same title as that of plaintiffs in suit of *Dowling et al. v. Power*, reported in 5 U. C. P. Reports, page 480. The plaintiff rested his case after proving that he was one of the brothers of testator, who died since 1st of January, 1852, seized of the *locus in quo*, viz., part of lot No. 26, north shore of Prince Edward's Bay, in the township of Maysburgh, in the county of Prince Edward, and that he had no children. For the defence, the will of the testator was put in and admitted, and the execution of the deed from the executors to James Power was also admitted. The defendants called evidence to shew that it was necessary to sell his real estate to discharge the testator's debts. After a good deal of evidence on this point, the jury found that his

indebtedness at the time of his death amounted to £41 10s., and that the value of half the personal property left by him was £74 5s. 6d. On this the learned judge directed the jury to find for the plaintiff, with 1s. shilling damages, with leave to move to enter a non-suit, if the court should be of opinion that the plaintiff, under the law and facts shewn, was not entitled to recover.

In Michaelmas Term last *S. Richards* moved to enter a non-suit, pursuant to leave reserved.

In Hilary Term last *Smith*, Q. C., shewed cause, arguing that the half of the land in dispute was not devised to the executors to sell, but that the words only gave them the power of sale, and the fee went to the testator's heirs.—*Sugden on Powers*, 5th Ed. 106, 272; *Yates v. Compton*, 3 P. Williams 308; *Lancaster v. Thornton*, 2 Burr. 1028. That the land could not be sold under the power, for there was sufficient personalty to pay the debts, and the devise of the residue was void, as being contrary to the the statute in relation to superstitious uses.

S. Richards, contra, contended, that leaving the residue of the land in the hands of his executors, to pay his just debts, &c., was in effect a devise to them of the land to pay his debts, and therefore passed a fee: that if the fee passed, it was of no consequence that the devise of the surplus was to a purpose void under the statute.—He referred to *Doe Rube v. Collins*, 7 U. C. R. 519; 5 Bar. & Ald. 785; *Doe Gillard and Gillard*, and *Doe Pratt v. Pratt*, 6 A. & E. 180, and to *Williams on Executors*, 413.

DRAPER, C. J., delivered the judgment of the court.

I have no doubt that the words, “proceeds of one-half of all my lands,” are sufficient to pass a fee simple to the widow. (*Johnson v. Arnold*, 1 Ves. Senr. 171; *Baines v. Dixon*, Ib. 41; *Doe v. Lakeman*, 2 B. & Ad. 42; *Stewart v. Garnett*, 3 Simons 398, and numerous other authorities).

I think it also quite clear that the widow was entitled to have the half of the personalty exonerated from the payment of the testator's debts by the sale of the other half of the land.

The giving the remaining half of the personalty, which is the effect of the words, "I leave in the hands of my executors and executrix," for the payment of the testator's debts, is only doing what the law would have done if there had been no such disposition in the will.

It has been held that money left to be laid out for masses to be performed for the benefit of the testator's soul, does not come within the terms of the statute 6 Edward I., ch. 14; but that such bequests were within the superstitious uses intended to be suppressed by that statute, and such legacies have in England, and since the statute 2 & 3 Wm. IV., ch. 115, been held void.—*West v. Shuttleworth* (2 Myl. & K. 684.)

The only *legitimate* objects of the will, as to the property not given to his widow, are the payment of his debts and funeral expenses, and the exoneration of the estate real and personal given to the widow.

If there had been no disposition in the will but the gift to the widow, and a creditor had recovered a judgment, the provincial statute would, I apprehend, notwithstanding the gift, have made it necessary to exhaust the personal estate before execution could have issued against the lands.

If the words "in the hands of my executors and executrix" were omitted, and the testator's language were "the other half of my lands, &c., I leave to pay all my just debts," there are numberless cases which shew a court of equity would decree a sale.

A power in the executors to sell to pay debts and funeral expenses would accomplish all the testator requires, except the disposition to the void use.

The first question is therefore reduced to this, whether the words used, namely, "the other half of my said lands and chattels, and effects of every kind whatsoever, I leave in the hands of my executors and executrix, to pay all my just debts, and to give my body a decent christian burial," confer simply a power or pass a fee.

In the clause immediately preceding, which confessedly carries a fee, the testator *gives* and *bequeaths the proceeds of half his lands* and chattels to his wife. He shews a

knowledge of what terms are apt and sufficient to give a fee simple, where such is his intention.

In the clause under discussion, he changes the whole form of expression. He neither *gives* nor *bequeaths*, and dropping the word “proceeds,” he speaks only of the other half of his *land*: a word clearly insufficient, if it stood alone, to pass a fee simple, at least before the statute of 1834.

It has not been contended that he designed by this second clause to give any beneficial interest to the executor or executrix. The contemplated disposition of the surplus shews this; and if there had been no such disposition, and the devise clearly passed a fee, the executor would remain liable for the surplus after satisfaction of the purposes of the charge.

There is a well established distinction between devises to the executors to sell and a devise of the lands to be sold by the executors. Speaking of this latter mode of disposition, Sir Edward Sugden remarks, “The analogy of this case to that of a devise that the executors shall sell the land, or that the land shall be sold by the executors, as well as the authorities, seem to warrant the conclusion that even a devise of land to be sold by executors, without words giving the estate to them, will invest them with a power only, and not give them an interest.” Sugden on Powers, 111.

The testator’s principal object seems to me to have been to protect his widow in the enjoyment of what he had given her, and the charging of his lands directly for the payment of his debts, avails more for the former than the latter purpose, as the result shews, since the half the personal estate is more than sufficient to pay his debts. We must assume that the testator knew that his lands would be liable for that purpose under the statute 5 Geo. II., though the will shews an expectation that his lands might be required to save the part of the personalty devised to the widow from liability, and an intention that they should be sold to effectuate that object, and also to dispose of the surplus, if any.

All this, however, could be accomplished by giving the executors a power of sale, and I am unable to perceive any stronger argument in favour of holding that the words “the

other half of my said lands and cattle and effects of every kind whatsoever, I leave in the hands of my executors and executrix, to pay all my just debts, and to give my body a decent christian burial," give the fee to the executors, than that they gave a disposing power. The latter construction derives force from the change of expression between this and the clause devising to the wife. It does not appear to me to be a strained construction to say, that a power to turn lands into money to pay debts is *leaving* the lands in the hands of the executors for that purpose.

I concede to the defendants' counsel that the words, "I leave" import more than a mere abstaining from disposing of the lands. I treat them as equivalent to the words, "I devise." The remaining words "in the hands of," &c., are not however in my opinion to be compressed into the preposition "to." The will cannot be literally construed, for the lands cannot be *left* in the hands of the executors, unless they are first placed there. We must look at the object of the testator, which I take to be the payment of his debts and funeral expenses out of this particular property designated, and out of no other until this was exhausted. With this view I read the sentence thus: "This other half of my said lands and chattels, and effects of every kind whatsoever, I devise" or "dispose of to pay all my just debts and funeral expenses, by the hands of my executor and executrix; and should there remain any surplus, then it is my will and desire that such remainder shall be given to the Catholic Church, for the performing of masses for the benefit of my departed soul."

This construction, it is true, will not prevent the estate from descending to the heir. But the only, or at least the most cogent evidence that the testator designed to prevent such descent, is the disposal of the surplus. I do not find in this expressed intention a sufficient reason to compel me to hold that the executors take a fee.

But whether the executors took the fee, or only a power of sale, will not, as the facts appear before us, avoid the deed to the defendants. There is nothing to shew any collusion between the executors and the defendants to bring

home to them any knowledge that the debts and funeral expenses were all fully paid out of the half of the personal effects. They must be taken, on the facts appearing, to be *bonâ fide* purchasers for value; and the money given for that part of the real estate, over which the executors had a disposing power, must be considered as properly in their hands for the benefit of those lawfully entitled. In this aspect the general rule enunciated by Lord *St. Leonards*, in *Stroughill v. Anstey* (1 DeG. McN. & G. 635, 16 Jur. 671), will apply—that when a testator by his will charges his estate with debts and legacies, he has shewn that he means to entrust his trustees with the power of receiving the money, *because there may be debts*. The testator provides for the payment of debts by the disposal of his land, and the power of disposal is expressed in general terms, and is not limited by the contingency whether there are debts or not at the time of his death. “The power does not cease because there are no debts, it being in the very creation of the trust a clear indication amounting to a declaration by the testator that he means, and the nature of the trust shews he means, that the trustees alone are to receive the money and apply it.” The *bonâ fide* purchaser for value, from trustees or executors, who are creditors, under such a power, is protected, and they are accountable for the money.

In my opinion, therefore, this rule must be made absolute.

On the latter subject see *Barker v. Duke of Devonshire*, 3 Mer. 310; *Spackman v. Timbrell*, 8 Sim. 260; *Ithell v. Beane*, 1 Ves. 215; *Jones v. Scott*, 1 Russ. & M. 255; *Eland v. Eland*, 4 Mi. & Cr. 420; *Watkins v. Check*, 2 S. & S. 199; *Johnson v. Kennett*, 6 Sim. 384; *Page v. Adam*, 4 Beav. 269; *Forbes v. Peacock*, 11 M. & W. 630, 1 Phil. 717.

Per Cur.—Rule absolute.

JARVIS V. THE GREAT WESTERN RAILWAY CO.

Railway—Damages—Highway.

The plaintiff owned certain land on Railway and Inchboy streets in the City of Hamilton, the former of which streets communicated northwards with Burlington Bay. The defendants owned the land along the shore of the bay and on both sides of Railway street as far as the damage complained of extended, and in the construction of their depots cut away the end of the street at the shore of the Bay, making an embankment and preventing egress to the northwards. The plaintiff brought an action for the injury done.

Held, that no private injury was proved, and no damage could therefore be claimed.

The declaration alleged that plaintiff owned certain premises on Railway street and Inchboy street in the City of Hamilton, being public highways affording easy access into and from other streets and highways north and eastward of the houses, such houses being occupied by tenants of plaintiff, paying rent to him; that defendants wrongfully, &c., cut, excavated and removed the earth out of the first-mentioned streets, and made a deep cutting entirely across them to the northward of plaintiff's houses, and between them and said other streets and highways, causing a perpendicular bank across the streets, destroying the means of communication between plaintiff's houses and these streets and the parts of the city to north and east of them, whereby plaintiff's houses ceased to be sought after by tenants, and became vacant, &c., to his damage.

Plea, that in 1836, Sir A. Macnab owned in fee certain described lands in Hamilton, and made a plan thereof and laid down thereon the street now called Railway street, one portion of which was contemplated to extend northerly from Concession street and from a street called St. Mary street to the water's edge of Burlington Bay, being the north limit of his land, and at which limit Railway street terminated, and he had laid out lots on one side of Railway street marked 65 and 66, and on the other side a park lot No. 15; that in 1836 he sold the park lot to one Witherall, and remained seised in fee of the lots 65 and 66 till the defendants acquired their land for railway purposes, being the land covered with water on the northerly limit of Macnab's lands, and he continued seised in fee of Railway

streets from Concession street and St. Mary's lane to the said north limit, and such last-mentioned portion of Railway street was not otherwise a public highway or street when defendants executed the after-mentioned works. That the defendants by grant from the Crown became seised in fee of the water lots on the north limit of these lands for their railway purposes, and for such purposes afterwards purchased in fee park lot 15 and lots 65 and 66, immediately adjoining their water lots: that afterwards at the time when, &c. it became necessary for them to extend their station yard and premises, and because the land including part of Railway street lying contiguous to their premises, consisted of high and steep banks, and that part of Railway street lay and led only to and through portions of the lands so owned by defendants on each side, and it became necessary for them to level the earth and soil of the last-mentioned portion of Railway street; they did accordingly excavate and level it for the use and purposes of their railway, and inclosed it within their station yard, which are the supposed grievances; and that plaintiff had not by his tenure of the houses and land on Railway street and remote from defendant's land and premises, nor otherwise, been damnified by defendant's works to any greater extent than any of H. M. subjects desirous of approaching defendants' station yard upon or by Railway street as aforesaid.

The plaintiff takes issue generally on this plea.

At the trial before *Hagarty*, J., at last Hamilton autumn assizes, *Gwynne*, Q. C., for defendants, contended in the first instance that in the issue the only point was, whether plaintiff was more damnified than any of the Queen's subjects. The case proceeded subject to this view.

Sir A. MacNab, called by plaintiff, proved the original laying out by him in 1834-5 of Railway street, intended as a public highway; that it ran to the water's edge; that defendants acquired the water lots on the shore at that point since 1847 or 1848, he surrendering his pre-emption right in their favour. He had another survey made in 1847, filed then in the registry office.

The county registrar produced the plan filed. He said

Railway street had been a highway for 16 years. There is no public highway below the point of obstruction intersecting Railway street. Other witnesses proved that this street was used many years as a highway, and persons would draw up timber and merchandize landed on the beach along this street into the town before the works of the defendants stopped it. A good deal of evidence was also given of the alleged loss by tenants leaving plaintiff's house in consequence of defendants' works cutting off access at the north end of the street.

On the defendants' side much evidence was given tending to shew that tenants had left the houses either from their bad state, or because work was scarce, and they moved elsewhere, and not from any injury caused by defendants' works. The nearest of plaintiff's houses is 60 feet above St. Mary's lane. The lane is fully 100 yards above the cutting. The farthest houses are about 400 yards from the cutting.

Mr. Reed, the defendants' engineer, proved by a map produced, that the excavation complained of is within defendants' property. That six months before excavation commenced, a fence ran across Railway street, separating it from the defendants' works. It is about 1,200 feet from this cutting to York street (see plan); that this cutting was necessary for railway purposes, as business increased so much more space was required. People used to drive over defendants' property as trespassers while it lay open, eighteen months ago, not since. It is about fifty feet from the foot of the cutting to the defendants' fence. Persons passing down Railway street would come to defendants' property.

The judge was of opinion that the plaintiff's case failed; that the complaint seemed to be the shortening by a short space of Railway street at a point where it met the defendant's premises, and below its intersection with other streets, (viz., Concession street and St. Mary's lane,) above which plaintiff's houses were situated. That plaintiff shewed no right peculiar to himself over any other of the Queen's subjects to bring this action. That any other inhabitant of Hamilton living far above plaintiff's house in other streets might apparently claim damages as fairly as he.

It was agreed that the verdict should pass for defendants, but that the jury might assess damages (if any) to plaintiff, caused by defendants' acts from the time of the cutting till the action commenced, say six months, with leave to plaintiff to move to enter the verdict for any sum found by them if the court thought the action sustainable.

The jury assessed the damages at £30.

In Michaelmas Term, *O'Reilly*, Q. C., moved accordingly.

In Hilary Term the case was argued by *O'Reilly*, Q. C., for plaintiff, and *Connor*, Q. C., for defendants, citing *Wilkes v. The Hungerford Market Company* 2 Bing. N. C. 281; *Iveson v. Moore*, 1 Lord Raymond, 486; *Rose v. Miles*, 4 M. & S. 101.

DRAPER, C. J., delivered the judgment of the court.

After a careful examination of the declaration, I feel no doubt that it contains a good cause of action, according to the doctrine in *Walker v. The Hungerford Market Company*, and the substance of the plea is to be found in the admission, that though they have enclosed a portion of Railway street, which is, I think, sufficiently admitted or proved to have been dedicated as a public highway, yet, that "the plaintiff hath not by reason of his tenure of the said pieces of land situate on certain other parts of the said street called Railway street, and remote from the lands and premises of the defendants, whereof the said plaintiff is seized as in his declaration alleged, nor otherwise, been damnified or prejudiced by the said works of the defendants, nor by enclosing within the station yard and premises of the defendants of that portion of the said street called Railway street so as aforesaid, enclosed by the defendants, and leading only to and through lands whereof the defendants are so seised as aforesaid, to any greater extent than any other of her Majesty's subjects desirous of approaching the said station road and premises of the defendants upon and by the said street called Railway street."

The defendants were wrong-doers in enclosing within their premises any part of Railway street; but that is *prima facie*, at least, a public wrong, the subject of proceedings to abate

a nuisance infringing on public rights. This *per se* gives no individual a right of action which is sustainable, not merely on the public wrong, but on the additional consideration that the plaintiff sustains some injury, loss, and damage peculiar to himself, whether in person or property. It becomes then a question of fact, and as I understand, it is submitted to us to say whether there was evidence to go to the jury of the peculiar damage alleged in the declaration, as if there had been a demurrer to the plaintiff's evidence, and the jury had assessed damages contingent upon the judgment on the demurrer. The plaintiff alleges that he was possessed of houses on Railway street, and Inchboy street, which streets afforded access to and from the houses, from and to other streets, and from and to parts of Hamilton lying north and east of the plaintiff's houses, and so enhanced the value of plaintiff's houses as tenable property; but that defendants wrongfully excavated and dug out the earth of Railway and Inchboy streets, and made a deep cutting across them in parts to the northward of plaintiff's houses *and between them and the other public streets*, parts of the city lying to the north and east thereof, and *thereby wholly obstructed and destroyed them, and all means of communication between the plaintiff's houses, and the streets and parts of the city lying to the north and east thereof, which theretofore existed over and along Railway and Inchboy streets*, thereby injuring the value of plaintiff's houses. Unless this allegation is substantially proved, the plaintiff has shewn no cause of action.

Now, I understand the evidence to shew that the obstruction complained of was to the north of the intersection of St. Mary's lane with Railway street. That Railway street from that part of the intersection did run originally as laid out to the waters' edge of Burlington Bay, and that no street ran into, or intersected Railway street to the north of St. Mary's Lane. That the lands covered by the waters of Burlington Bay at the northern extremity of Railway street, and of the lots on both sides thereof, have been granted by the Crown, and are now the property of the defendants. That these water lots have been filled in with earth and form part of the defendants' Hamilton Railway station, and that

Railway street as originally laid out, if now entirely laid open, would all the way north of St. Mary's Lane, touch on either side east or west on the defendants' premises, and be also terminated on the north by their premises, so that it would be a *cul de sac*, having no thoroughfare, and unless there were gateways or openings into defendants' premises, having no mode of getting out except by the way a person got in, and consequently that the whole effect of the excavation and enclosure of a part of the north end of Railway street by defendants has been to shorten the length of the street, but not otherwise to effect either public or private interests or rights. But if this statement be correct it does not stop any means of communication between the plaintiff's houses and the streets and parts of the city of Hamilton lying to the north and east thereof, which theretofore existed over and along Railway and Inchboy streets. For Inchboy street is not effected at all excepting as communicating by St. Mary's lane with the north part of Railway street, and there never was a communication over and along that part of Railway street where the obstruction complained of exists between the plaintiff's houses and the streets, and parts of the city north and east thereof. That part of Railway street communicated only with lands now the property of the defendants, and to or through which the plaintiff neither shews nor pretends any special and particular right.

My brother *Hagarty*, who tried the cause, reports that is the substantial effect and purport of the evidence, and it being so, I am of opinion this rule should be discharged.

Per Cur.—Rule discharged.

BURROWS V. GATES ET AL.

SPECIAL CASE.

Ejectment—Assignment—Estoppel.

One C. B. assigned all his estate and effects for the benefit of his creditors generally to the defendants. The assignment contained three parties, C. B. being the party of the first part. The defendants of the second part and "the several other persons whose names and seals are hereunto subscribed and fixed creditors of the said C. B. of the third part," no creditor executed the assignment, but the defendants (assignees) admitted part of the plaintiff's claim by letter.

Held, that such admission made him a party to the assignment although he had not executed it, and that they were liable for money had and received.

Held, also, that as a defendant in ejectment is estopped from denying the title of the person through whom he claims, even although that person may have no legal title to the land. So, one who occupies under another may be liable for use and occupation.

This was an action brought for money payable by the defendants to the plaintiff, for the defendants' use by the plaintiff's permission, of messuage and lands of the plaintiff, and for boarding, lodging and washing by the plaintiff, furnished and done for the defendants and their servants, at the defendants' request, and for money received by the defendants for the use of the plaintiff, and for the wages of the plaintiff as the hired servant of the defendants, and on their retainer, and for work done and materials provided by the plaintiff for the defendants at their request, and for money found to be due from the defendants to the plaintiff, on account stated between them.

To which the defendants pleaded, never indebted, and payment before action.

At the Perth assizes at Stratford, the case was referred by order of Hagarty J., to Christopher Robinson, Esq., upon which reference the following award was made, subject to the opinion of the court on the points therein stated, as follows:—Whereas, at the assizes held at Stratford, in and for the county of Perth, on Monday, the 12th day of April, in the year of our Lord, 1858, before the Honorable *John Hawkins Hagarty*, one of the judges of Her Majesty's court of Common Pleas, appointed to take the said assizes on the trial of the cause in which Charles Burrows was plaintiff, and Frederick W. Gates and John Ferrie defendants, it

was ordered by the Court, with the consent of the parties, their counsel and attorneys, that the said cause should be referred to Christopher Robinson, Esq, barrister-at-law, to make an award on all matters in dispute in the said cause, depending simply on questions of fact, and to state a case for the opinion of the court on all points in dispute, on which, in his opinion, any question of law might arise. And, whereas, it was also ordered that the costs of the said reference should be costs in the cause. Now I, the said arbitrator, having taken upon myself the said reference, and having duly considered the evidence produced before me, do hereby make and publish my award in writing, of and concerning the matters above referred to me, in manner following, that is to say: I find that the cause referred to me is an action brought on the common counts, for money payable by the defendants to the plaintiff, for the defendants' use by the plaintiff's permission, of messuage and lands of the plaintiff, and for boarding, lodging and washing by the plaintiff, furnished and done for the defendants and their servants at the defendants' request, and for money received by the defendants for the use of the plaintiff, and for the wages of the plaintiff as the hired servant of the defendants and on their retainer, and for work done and materials provided by the plaintiff for the defendants, at their request, and for money found to be due from the defendants to the plaintiff, on account stated between them. That the defendants have pleaded never indebted and payment before action, on which issue is joined.

And as to the said several claims I further award and find:

1st. As to the claim for money had and received, that is for the dividend or £335 claimed to be due by the estate of Charles Burrows, junior, to the plaintiff, his father. That the defendants are assignees of said estate, under an assign-off of which a copy is filed herewith; that this claim is rested altogether upon the letters of the 20th of April and 12th of May, written by F. W. Gates & Co., copies of which letters are given below, marked A. and B. respectively; that no other evidence was given as to the indebtedness of the as-

signor to the plaintiff, and that the plaintiff never executed the assignment, but it is admitted that a dividend of 4s. in the pound has been declared by the assignee. If the court should be of opinion that the plaintiff is entitled to recover such dividend, then I award that the same, amounting to the sum of £65, shall be paid by the defendants to the plaintiff.

2nd. Under the claim for wages, I find that the plaintiff had been employed by the assignor as clerk in his shop, previous to the assignment, at a salary of twenty-five dollars a month, that he was continued in such employment by the assignees, and that he is entitled to £31 5s., up to the time of his dismissal, which sum I award to be paid to him by the defendants.

3rd. I find that the boarding, lodging, and washing claimed, is alleged to have been supplied by the plaintiff to Messrs. Stevenson and Spence, two clerks employed by defendants, and that the plaintiff is entitled to £7 10s. therefor, and I award that sum to be paid by the defendants to the plaintiff.

4. As to the claim for use and occupation, I find that the shop in which the business had been carried on by Charles Burrows, junior, previous to the assignment, was built by the *plaintiff* upon land which he (the plaintiff) had occupied for some seven years, but as a squatter only, the title being in the Crown, that this building had been occupied by the assignor for about two years before the assignment, and that he had previously carried on his business in another building on the same lot, which he had assisted the plaintiff to put up.

It was not shewn in evidence before me, that the assignor had paid rent to the plaintiff, or that any definite arrangement as to rent had ever been made between them.

There was no express agreement on the part of the defendants to pay rent to the plaintiff, nor any proof of demand made upon them first, until at a few days before the time of their giving up possession in September, 1856.

The question for the opinion of the court is.

Whether under these circumstances the plaintiff is entitled to recover from the assignees for the use and occupation of the shop while in their possession. If the court should be of

opinion that he is so entitled, I find that the amount which the plaintiff should receive is £16 13s. 4d., and I award that sum to be paid to him by the defendants, subject to the opinion of the court.

In witness whereof, I have hereunto set my hand this 21st day of May, in the year of our Lord, 1858.

Signed and published this }
21st day of May, A. D., } (Signed) C. ROBINSON.
1858, in presence of,

F. H. STAYNER.

(Copy.)

Letters marked A and B, referred to in the annexed award.

HAMILTON, 20th April, 1857.

DEAR SIR,—We are favoured with yours of the 17th inst., enclosing £12 10s., twelve pounds ten shillings, which we carry to your credit in account.

In our next we will be able to advise how to act in reference to your claim on your son's estate.

CHAS. BURROWS, } Yours truly,
Wallace. } (Signed) F. W. GATES.

HAMILTON, 12th May, 1857.

DEAR SIR,—We are favoured with yours of the 8th inst., enclosing £7 10s., seven pounds ten shillings, which we carry to your credit in account, with thanks.

On talking over the matter with Mr. Stevenson, he will only admit your claim to the extent of about £325, three hundred and twenty-five pounds, as he says there are large deductions to be made from the £600 odd claimed. If you like we will credit your account with the dividend on £325 in the meantime, and leave you to settle the balance with Mr. S.

CHAS. BURROWS, Esq., } (Signed)
Wallace. } F. W. GATES & Co.

In Easter Term the case was argued by *Paterson* for plaintiff, citing *Roper v. Holland*, 3 Ad. & E., 99; *Edwards v. Loundes*, 1 E. & B. 89; *Edwards v. Bates*, 7 M. & G. 590; *Reg. v. Temple*, 17 Jurist, 573.

W. Eccles, for defendant, cited *Birch v. Wright*, 1 T. R. 387; *Doe Loyd v. Powell*, 5 B. & C. 313, and *Tew v. es*, 13 M. & W. 12.

RICHARDS, J.—I shall take up the question of the right of the plaintiff to recover the £16 13s. 4d., for the use and occupation of the shop first. In Addison on Contracts, edition of 1856, at p. 371, it is laid down: “The foundation of this form of action (use and occupation) is the use and occupation of reality by the defendant with the permission of the plaintiff. The action will lie, without proof of any demise on the implied promise resulting from the simple fact of the permissive use and enjoyment of the property, referring to *Hellier v. Sillcock* (19 L. J. Q. B. 295, *ib.*, 14 Jur. 573.) If plaintiff was the owner in fee of the real estate, the authorities seem to me to be clearly in favour of the plaintiff’s right to recover. In the case quoted, the defendant resided with his mother-in-law, a widow in a copyhold tenement of a manor in which there was a custom of widowhood until her death, and continued to reside there. Afterwards the plaintiff, who was the reversioner, was admitted to the tenement a few months before action brought. It was contended for defendant, though ejectment would lie an action for use and occupation would not. In giving the judgment of the court, *Lord Campbell* observed: “The question was, whether an action of assumpsit for use and occupation will lie, the count being on a *quantum meruit*. We think that it will, as the defendant occupied the cottage by the plaintiff’s permission. The defendant was not a trespasser, he set up no adverse title to the premises. This is not converting a trespass into a subject of an action for use and occupation, because the allegations in the declaration are proved, viz., that the defendant occupied the premises, and with the consent of the plaintiff. An action for use and occupation lies without a demise, and therefore, although strictly there was no tenancy, we are of opinion this action will lie.”

In the case before us defendants’ assignor went into possession of the premises under plaintiff, and therefore must have been at least a tenant at will. If plaintiff was the owner in fee, I have no doubt, as we have already observed, he would be clearly entitled to recover. Then under the facts shewn as between these parties, can it

be of any consequence that plaintiff is a squatter only? Could defendants' assignor have set this up in an action of ejectment, having gone into possession under plaintiff? I should think not. If not in ejectment, then he could not in an action for use and occupation. And if this be correct, neither can defendants, as they cannot be in a better position than the party under whom they entered. On this point I think plaintiff entitled to recover.

The next and more difficult question is his right to recover the sum of £65, being the dividend of 4s. in the pound, declared by defendants, payable to the creditors of the assignor out of his estate. The assignment itself is a very peculiar one, and really contains but slight reference to the creditors of Charles Burrows the assignor, the party of the first part named therein. The defendants are mentioned as being the party of the second part, and it then goes on "and the several three (probably meaning "other") persons whose names and seals are hereunto subscribed, and fixed creditors of the said Charles Burrows, of the third part;" it then proceeds to recite that, "Whereas the said party of the first part is indebted to the said several persons parties hereto, of the third part, in divers sums of money, and being unable at present to pay the same, has proposed and agreed to assign all his estate and effects unto the said parties of the second part, upon trust for the benefit of the said creditors of him the said party of the first part, in the manner hereinafter mentioned." He then proceeds to assign all his estate and effects to defendants upon trust, to sell and dispose of the property and get in the debts, and declares that they shall stand seised of the moneys: 1st. To pay costs and charges of getting in the *debts*, &c., executing the trusts. 2nd. Retaining themselves a fair per centage for their services. And 3rd. To apply the residue "in or towards payment and satisfaction of the several debts and sums of money due and owing (to the said *several persons* and *firms*, *parties thereto*, (see) of the third part,) by the said party of the first part, whether on his own individual account or as a member of any firm or co-partner with any other person, either now or

formerly, or how otherwise, *pari passu*, and without any preference or priority of payment, and after payment or satisfaction of the whole of such debts, and of such costs and charges and expenses aforesaid, then in trust, to pay the surplus money unto the said party of first part, his executors, administrators, or assigns, on demand." Then follows the usual authority to defendants constituting them his attorneys to collect in debts, &c., declaring defendants only liable for their own defaults and omissions, &c., but containing no provision whatever for the creditors releasing assignor from the debts or any covenants or agreements of any kind on the part of the creditors; the assignment is executed by the said Charles Burrows and the defendants only. No creditor appears to have signed as a party of the third part.

Vice-Chancellor *Wood*, in *Raworth v. Parker*, 27 L. T. 62, in reference to composition deeds, states, "The rules of equity seem to be these, although composition deeds may contain provisions that they are to be executed by the creditors within a limited time, they are nevertheless to be construed with latitude; and it is not necessary in equity for a creditor *to seal and deliver* the deed, provided he indicates within due time his assent to the terms of it, and his intention to act under it. In the same case it was stated in argument by counsel, and seemed to be admitted; 'The real rule in all cases such as this was, that the creditor must either assent to the deed within the specified time, or do some act by which he might himself be bound and precluded from afterwards objecting to the deed.'"

In *Forbes v. Limond*, 18 Jurist 33, Vice-Chancellor *Stuart* observes, at p. 38, "The cases quoted on behalf of the plaintiff proceed upon a clear and well recognised principle, that a man by his acts and conduct in regard to the stipulations in a deed, without executing that deed, might subject himself to the liability and acquire rights under it *as fully* as if he had actually *executed it under his hand and seal*. On this point there was indeed no controversy at all."

In *Harland v. Binks*, 15 Q. B., 713, a debtor had executed a *bonâ fide* deed of assignment for the benefit of such credi-

tors as should come in under the deed, and execute it. The deed was executed by the debtor and the plaintiff, the assignee, sometime in July; on the 14th of August the attorney, in the name of the plaintiff, took possession of the goods; on the 23rd of August the sheriff seized the goods. No creditor had at this time executed the deed, the plaintiff not being a creditor. Evidence was given to shew that one of the creditors came to the attorney after he had taken possession of the goods, and before they were seized by the sheriff, to demand an explanation, which the attorney gave. The creditor appeared to be satisfied, and went away and took no further steps to obtain payment of his debt either under the assignment or independently of it; the question was whether the plaintiff was a trustee for creditors, or whether the assignment was revocable, not having been executed by any creditor before the seizure of the goods by the sheriff. It was stated in argument, that any assent by the creditor that makes the creditor privy to the conveyance, is sufficient to make the assignee a trustee for the creditor.

It is not necessary in order to create the relation of trustee and *cestui qui trust*, that the latter should execute the deed; the court held *that that* relation was established by the act of the creditor in expressing his satisfaction at what had taken place, and that the assignee held as trustee for the creditors, though they had not executed the deed.

In *Harrh v. Wall*, 2 Starke's N. P. C. 195; 1 B. & Ald. 103, it was held that a creditor who executed a composition deed in which the amount of his debt is left in blank, binds himself to the extent of all his existing claims against the insolvent, although the deed refer to "sums set opposite the names" of the executing parties.

Daniel v. Landres, 2 Chitty's Reports, 564; see also *Holmer v. Viner* 1 Esp. 132, which was an action on a composition deed. It recited that W. W. was indebted to his said several creditors in the several and respective sums of money mentioned and set opposite to their respective names in the schedule to the indenture underwritten, defendant then covenanted to pay the composition to the creditors at the rate of 7s. 6d. in the pound of the respective debts then justly due them,

and which debts were set opposite to their respective names *in the said schedule thereunder written*. In an action to recover the amount of the composition, the defendant pleaded that there was no debt set opposite the name and seal of the plaintiff in the schedule. Replication, that W. W. was justly indebted to plaintiff in £994 8s., but that plaintiff, not knowing the exact amount, omitted to put it opposite his name in the schedule to the indenture, but afterwards, and before commencement of suit, defendant had notice of the amount of the debt, and was requested by plaintiff to pay the dividend on it. On demurrer to the replication there was judgment for plaintiff, the court holding that, being a creditor at the time of executing the deed, made him a party to it, and defendant had notice of the amount of plaintiff's claim.

I refer to these cases, though they may not all be exactly in point for the purpose of shewing that the courts of law and equity are desirous, as far as possible, of carrying out the intention of the parties in relation to these assignments for the benefit of creditors.

In the case before us, although plaintiff never signed the deed, nor did any other creditor, as such, and as a party of the *third* part, and although it does not appear therefrom or from the case that defendants were creditors, yet it sufficiently appeared that plaintiff claimed to rank on the assignment for Messrs. Gates & Co., in their letter of the 20th April, 1857, saying, "In our next we will be able to advise how to act in reference to your claim on your son's estate." Then on the 12th of May they say, "On talking over the matter with Mr. Stephenson, he will only admit your claim to the extent of about £325, as he says there are large deductions to be made from the £600 odd claim. If you like we will credit your account with the dividend on the £325 in the meantime, and leave you to settle the balance with Mr. S." If, after this, the goods had been seized as the property of the assignor, it appears to me that *Harland v. Binks* is an express authority to shew that defendants would hold the goods as trustees for the benefit of plaintiff, if not of the other creditors. If it be admitted that the relation of

trustee and *cestue que trust* existed, then when the trustees declare the dividend, do they not virtually hold the dividend so declared as so much money had and received by them, free of the trust, for the creditors, at all events for those whom they have recognised as such? The letters seem to me to be satisfactory evidence to shew that defendants recognise plaintiff as a creditor entitled to rank on the estate of Charles Burrows, to the extent of £325. They have declared a dividend on that estate of 4s. on the pound, and Messrs. Gates & Co. have offered to pass the amount of the dividend to plaintiff's credit in their books. In *Bartlett v. Dimond*, *Pollock*, C. B., in giving the judgment of the court, states that if the trust was ended, or defendant's testator had stated an account, or, in other words, *had admitted himself to the plaintiff that he held any sum of money in his hands payable to him absolutely*, he would, with respect to that sum, be a *debtor*, not properly a *trustee*, and then an action would have been maintainable against him.

In *Edwards v. Lowndes*, 1 E. & B., at page 39, Lord *Campbell* observes, "If indeed the trustee, by appropriating a sum as payable to the *cestue que trust*, or otherwise, admits that he holds it to be paid to the *cestue que trust* and for his use, the character of the relation between the parties is changed, and the trustee does not hold it as a trustee properly so called, but as a receiver for the plaintiff's use, who may maintain an action at law for money had and received, founded upon the appropriation to his use and the liability thence arising.

We must presume that the intention of the assignor was to place the property in the hands of the defendants for the benefit of the whole of his creditors, and not a mere placing of his property in their hands to be again disposed of by himself. Now, as no creditor has actually signed the deed, defendants would either hold to themselves to pay their own debts, and the balance to the assignor, or as trustees for such of the creditors as had signified their intention of availing themselves of the trust. I have already stated that I think we may safely assume that plaintiff did declare

such intention. Then, why is he not entitled to the dividend? The answer is, because he has not signed the deed; the trust declared being to the creditors of the assignor, parties of the third part whose names *are subscribed to the deed*. It is not denied that he is a creditor of the assignor; but he has not signed the deed; the assignees have, however, recognised his right to rank on the estate for £325, as a creditor. Then what beneficial purpose would be served by his signing the deed? There are no covenants in it not to sue the assignor, and there is no release of the debts of the parties signing. It may be contended that as to the parties signing there was an implied undertaking that they would not sue the assignor until a reasonable time had elapsed to enable the assignees to get in the estate. Even if that were so, which I am not prepared to admit, would not the implied undertaking arise equally from claiming to rank under the the assignment, and receiving dividends under it? Then, who is there to object to the plaintiff's receiving the dividend? Not the assignor, because the amount was applied to the payment of his debt to a party who claims to be beneficially interested under the assignment, and whom he would be personally liable to pay in full to the defendant the amount of his claim if it is not paid out of the estate. Not the other creditors, for they are not parties to the assignment if plaintiff is not, and therefore have no interest in it. Nor the assignees themselves; for they hold the property for the creditors on the trust which arises entirely for all that we see from plaintiff claiming to be beneficially interested under the assignment, and they have recognised him as a creditor of the assignor, and declared a dividend on his claim.

On the whole we are of opinion that the plaintiff is entitled to recover both the £65, the dividend on the estate, being the first question submitted for the court, and the £16 13s. 4d., for use and occupation, being the second question submitted to the court by the arbitrator.

To explain one of the letters, it may be as well to remark that it appears that the Mr. Stevenson named therein was a clerk employed by defendants to wind up the estate.

The action for money had and received is one of a peculiarly equitable character. As to the dividend declared in this case, plaintiff's *legal* right does not arise from the deed or from his being a party to it, but from the declaration of defendants that, in carrying out a trust, certain moneys came into their hands, which moneys they now hold free from the trust and all equities for plaintiff. That being the case, there is an implied obligation at law to pay it over, and the action for money had and received, and perhaps on the account stated, lies for it.

Judgment for plaintiff.

TRINITY TERM, 22 VICTORIA.

Present.—The Hon. WILLIAM HENRY DRAPER, C. B., C. J.

“ WILLIAM BUELL RICHARDS, J.

“ JOHN HAWKINS HAGARTY, J.

STAYNER V. APPELGADE.

Deed—Married women—Certificate.

Held, that a certificate of examination of a married women on the back of a conveyance, which did not state that she was examined “apart from her husband,” and no proof of that fact being given on the trial, was insufficient.

EJECTMENT for the west half of No. 7, 7th concession north of the Egremont road, township of Warwick. Writ tested 24th of July, 1857. The plaintiff claimed title as assignee of George S. Boulton, who was assignee of Samuel and Elizabeth Hawley, and Elizabeth Hawley was grantee of the crown.

The case was tried in May last at Sarnia, before the Chief Justice of Upper Canada. The only point requiring notice is, that the land was conveyed by Samuel Hawley, and Elizabeth his wife, which Elizabeth was seised thereof as grantee in fee from the crown, by a deed bearing date 16th June, 1840, and in that deed was indorsed a certificate in the following words :

“ Upper Canada, } Before Samuel Dorland and
Midland District, to wit : ” } Samuel Casey, Esquires, two of
Her Majesty’s Justices of in and for the said district,
personally appeared, the within named Elizabeth Hawley,
who did in our presence execute the within indenture, and
being duly examined by us touching her consent to alienate
her right, title, and interest to the within mentioned premises,
it did appear unto us that such consent was free and voluntary,
and not the effect of coercion on the part of the husband,
or any other person or persons whatsoever. Given under our

hands this sixteenth day of June, 1840." (Signed by the two justices.)

It was objected that this certificate was insufficient for not containing the words "apart from her husband." The learned Chief Justice overruled the objection, and the plaintiff had a verdict.

In Easter Term, *S. Richards* obtained a rule *nisi* for a new trial, on the ground of misdirection; and in the following term *Becher*, Q. C., shewed cause citing *Jackson v. Robertson*, 4 C. P. U. C. 272; *Allison v. Rednor*, 14 U. C. Q. B. 459; *Tiffany v. Cumber*, 13 U. C. Q. B. 159.

Richards, in support of the rule, cited *Jolley v. Hancock*, 7 Ex. 804.

DRAPER, C J., delivered the judgment of the court.

The statute of Upper Canada, 1st Wm. IV., ch. 2, sec. 1, enacted, that from and after the 1st August next after the passing of the act, it should be lawful for any married woman, being above the age of 21 years, residing within the province, and seised of real estate therein, to alien and convey such real estate by deed to be executed by her jointly with her husband, to such use and uses as to her and her husband shall seem meet. Provided that such deed should not be valid, or *have any effect* unless she executed the same in presence of one of the judges of the court of King's Bench, or of a judge of the District Court, or of the Surrogate Court of the district in which she resided, or of two justices of the peace of such district, and unless such judge or justices should examine such married woman *apart from her husband* respecting her free and voluntary consent, to alien and depart with her estate as mentioned in the deed, and should on the day of the execution of such deed, certify on the back of the deed in some form of words, to the following effect, and then a form of certificate is given, containing the words: "apart from her husband."

The statute of the 2nd Vic., ch. 6, sec. 2, (passed 11th May, 1839,) enacted that the certificate to be indorsed on any deed pursuant to the said act (1 Wm. IV., ch. 2) shall be to the following effect: that on the day, and at the place

mentioned in the certificate, the deed was duly executed in the presence of (the party certifying, I presume) by—— the wife of—— one of the grantors therein named, and that the said —— at the said time and place, being examined by (the certifying party) apart from her husband, did appear to give her consent to depart with her estate in the lands mentioned in the said deed freely and voluntarily, and without coercion, or fear of coercion on the part of her husband, or of any other person or persons whatsoever, “and that such certificate shall be deemed and taken to be *primâ facie* evidence of the facts contained therein.” This latter provision was not in the statute 1st Wm. IV.

The 43rd Geo. III., ch. 5, the first statute which made any provision in Upper Canada respecting the execution of deeds by married women, did not require the certificate to state that the married woman was examined apart from her husband, nor did the 59 Geo. III., ch. 3, or the 2nd Geo. IV., ch. 14.

The enacting that the certificate should state among other things, in effect, that the married woman was examined “apart from her husband,” is, I conceive, equivalent to an enactment that she should be so examined, in order to give effect and validity to the deed. Without the enabling provisions are observed and complied with, the deed cannot be valid or have any effect, and such observance and compliance are matters to be proved, where the validity and operation effect to pass the woman’s estate, if such deeds are in question. The statute makes the certificate *primâ facie* evidence of the facts contained therein, but this fact must be proved, or the enabling provisions, those which give effect to the deed, are not all shewn, for there is no reason why without proof of this, among other things, we should hold the deed to be valid. It was argued, that the words “duly examined,” which are contained in the certificate, supplied evidence that the wife was examined apart from her husband, and so the certificate was sufficient, but the deed is not to be valid unless she was examined apart from her husband, and unless the judge or or justices who made the examination certified to the fact. It would, I think, be going too far to hold, 1st, that the word “duly,” imported a certificate of an examination apart from

the husband, and second, that it furnished evidence of the fact itself, for it cannot be said that an examination apart from the husband is a fact actually contained in the certificate, even if it could be inferred from what is stated in it, and if so there is not even *primâ facie* evidence of that fact.

Whether proof of the fact may be given *dehors* the certificate or no, I do not at present mean to decide. My leaning is in favour of the conclusion that it may, because when the statute makes the certificate only *primâ facie* evidence of the facts it contains, the inevitable conclusion is that other and more satisfactory and conclusive evidence may be given.

But then the difficulty will still remain, whether if the fact be upon evidence *dehors* the certificate found by the jury, and the language of the certificate is sufficient, we can say it is a certificate that the wife was examined apart from her husband. I withhold any positive opinion on this point until there is a finding in fact that there was such an examination. At present, I feel great doubt whether the fact of such examination, if it really took place, is contained in, or is to be implied from, the certificate as it is framed. I am rather inclined to hold that it is not.

There must, in my opinion, be a new trial without costs.

Per Cur.—Rule absolute without costs.

LAZARE V. THE PHŒNIX INSURANCE COMPANY.

Evidence—Fraud—Insurance.

Held, that sworn entries in the custom house of the quantity and value of goods imported by the party claiming damages (occasioned by fire under a policy of insurance who claimed a much larger amount than) appeared to have been imported during the period claimed for, were evidence to go to the jury as a measure of damages.

DECLARATION on policy of insurance against loss by fire dated 26th of June, 1857, for £2,500 on goods in premises on King Street, Toronto, and £500 on shop furniture and shop fixtures for one year from the 18th June, 1857. That while the policy was in force a fire occurred, when the stock in trade, furniture, and fixtures were in part destroyed, in part damaged, and in part lost to the plaintiff, the loss amounting to £3000, whereof defendants had notice. That before the making of this policy, the Royal Insurance Company had, by their policy, dated 18th June, 1857, insured the same stock for

£1,000, which policy was in force at the happening of the fire, whereof defendants had notice. That plaintiff hath observed and performed all things, &c., and is entitled to recover £3,000 from defendants as their just proportion of the loss.

Pleas—1st. *Non est factum*. 2nd. Property, &c., not destroyed as alleged. 3rd. Sets out the following condition of the policy: "All persons assured by this Company sustaining any loss or damage by fire are forthwith to give notice to the Company or its agent, and as soon as possible after (within 14 days at furthest) to deliver in as particular an account of their loss or damages, signed with their own hands, as the nature of the case will admit of. In this account the property and articles must be specified in detail with the quantities, qualities and prices, and the assured make proof of the same by his oath or affirmation, and by his books of accounts or other proper vouchers as shall be reasonably required, no profit or advantage of any kind is to be included in such claim, and if there appears any fraud, overcharge, or imposition, or any false swearing, the claimant shall forfeit all claim to restitution or payment by virtue of this policy." Averring that though plaintiff did give notice, he did not within fourteen days, deliver as particular an account, &c., as the case would admit of, and did not, though required by defendants, deliver an account specifying in detail the property and articles with the quantities, qualities, and prices thereof for which he claimed payment, nor did he make proof thereof by his oath or affirmation, and by his books of account and other proper vouchers. 4th. Refers to the condition set forth in the 3rd plea, and avers that in the affidavit of the plaintiff attached to the account delivered by plaintiff of the loss, &c., there is false swearing in this, that plaintiff swears he has sustained a loss by the fire amounting to £3,145 18s. 1d., whereas he sustains a loss to a much smaller amount, *i. e.*, £730.

Replication takes issue on the 1st and 2nd & 4th pleas. To the 3rd, that plaintiff did within 14 days deliver in as particular an account of the loss as the nature of the case

would admit of. That defendants required that plaintiff should state in detail the quantities, &c., and make proof by his oath and verify the same by his books of account, &c., was not reasonable, but plaintiff complied with such request so far as he could, and after such request he furnished as particular a statement as the nature of the case would admit of, and offered to produce his books of account and sale, and stock books and invoices to defendant's agent, who refused to examine the same.

Rejoinder takes issue on the replication.

The trial took place at the Toronto assizes in May, 1858, before *Richards*, J. The plaintiff had brought another action against the Royal Insurance Company, which was tried before this came on, and by consent the evidence given in that cause was read in this. The fire took place on the 17th December, 1857. It appeared to have been caused by the hot air furnace in the basement story beneath the plaintiff's shop, having been placed too near part of the woodwork. The question arose upon the extent of the loss by fire by damage to goods saved, and by goods having been carried off and stolen in the hurry and confusion. The plaintiff in his affidavit made in pursuance of one of the conditions of the policy, swore that his stock in trade at the time of the fire was at the actual cost price, and exclusive of any profit, worth \$21,983 29c. or £5,494 10s. 6d. within a fraction, and that the loss or damage to the goods insured amounted to \$12,703 61c., £3,175 18s. plus a fraction, and that the damage to the shop furniture and fixtures was £137. The fire was soon got under; a large hole was burnt through the floor, but of the goods saved few were injured by fire, the principal spoiling of them arose from their having been wetted or injured in the removal. The goods saved were appraised at cost price to be worth £3003 11s., from which the appraisers had deducted £728 12s. 6d., the value of the damage they had sustained. This left £3221 8s. 1d., unaccounted for. The plaintiff accounted for £45 10s. of this deficiency, and thus reduced this claim to £3175 18s. 1d., including the £728 12s. 6d. damages, thus claiming for goods lost or stolen £2,447 5s. 7½d. The plaintiff called two

females who had been for some time in his employment to prove that they assisted him in taking stock, he making the entries and marking the prices, up to the 30th August, 1857, according to which the value of the goods then in the shop was £3,137 5s. He also produced several invoices from A. J. & B. Rheins in Paris, amounting to £2,804 4s. 9d., dated between the 15th of August, and the 15th October, 1857, with regard to which he proved by the same witnesses that they had assisted in opening and unpacking goods after the 30th of August, purporting to come from Paris. That the plaintiff had the invoices and checked them as the witnesses called off the goods they unpacked; other invoices from Montreal and Toronto merchants were also put in shewing purchases by plaintiff from them to the amount of £177 15s. since the 30th of August, 1857. In this manner he endeavoured to establish that he had goods amounting to £5495 16s. 6d., after deducting the sales for September, October, November and December, 1857 (less his profit thereon) which he proved by his books and these witnesses came to £622 14s. 8d. and including a profit of $33\frac{1}{3}$ per cent., actually amounted to £934 1s. $11\frac{1}{2}$. The sale book contained the transactions of more than a year, and shewed the monthly average to be about £355, from which, deducting $33\frac{1}{3}$ per cent. for profit, would make the monthly reduction of the stock about £237, or £2844, for the year's sales at cost prices. The plaintiff's stock consisted of silks, laces, gloves and other fancy dry goods of an expensive character, boots and shoes, jewellery and perfumery. The silk and lace goods apparently were the most valuable of the goods. The jewellery was more showy than intrinsically valuable. The Paris invoices of goods received since the 30th of August do not shew £300 of goods of this description, and in the stock of the 30th of August, 1857, including £12 10s. for shell combs, and £15 for fans, there is a little over £100 of goods of this description, while in the inventory of goods saved there are £163 worth of goods of this description. Besides the testimony of these two witnesses the plaintiff examined several others. Some merchants, others engaged in the same kind of business, who frequently came into his

shop, who stated their opinion and belief that his stock before the fire was worth £5000 or £6000. Several of the witnesses stated that they were at the fire; that before the police arrived or took any active part there was great confusion, people going into the shop and carrying away goods, and some stated that they saw goods carried away, going to the east and to the west, by armsful. A few days after the fire a witness found some bracelets, &c., in a manure heap in a yard nearly opposite plaintiff's shop, which he returned to the plaintiff.

On the defence the Chief and Deputy Chief of Police and some of their men were examined to prove that they were on the spot soon after the alarm was given, and when the shop door was first opened. That the goods carried away to the west were deposited in the Rossin House, and those to the east in Wray's and in Smith's houses. That from the look out kept, no considerable amount of goods could have have been stolen. Their evidence and that of other witnesses, went to shew that a very small quantity of goods could have been destroyed by the fire. One witness proved that at the very first opening of the door he was there, and got four boxes of ladies' silk dresses from plaintiff, and took them to his house, and returned and got four more boxes, which plaintiff soon after sent for. Another witness (a clerk in a mercantile firm in Toronto, who had sold goods to the plaintiff) stated that he had examined the appraised list of things saved and the stock book, and that in his opinion from one half to three quarters of the things saved were of those in the stock book of the 30th of August, 1857. The inspector of the defendants stated that he saw plaintiff the morning after the fire; that plaintiff then said there was nothing burned as he thought. On that day he said nothing about things missing; that the following day he said he was afraid there were some things stolen. The defendants further proved that all the goods entered by plaintiff at the port of Toronto as foreign importations between the 30th of August and the 31st of December, 1857, amounted only to about £500, and the original entries were produced in court. He made these entries and the affidavit necessary for

them himself. The plaintiff was also called as a witness by defendants. He swore the invoices produced at the trial were the original invoices of the goods he received. That he did not remember entering any goods except at the port of Toronto. He could not state whether the goods entered were those included in the invoices, or when any of them were entered. He swore that the day before the fire his stock was about £6000; that he had not concealed or disposed of any of the goods; that he saw great quantities of goods carried off; that he missed great quantities of jewellery; that the whole stock was destroyed of that kind of goods; that he missed a great quantity of goods of this kind after they were put into the Rossin House; that the Insurance Company took charge of them after they were put in the Rossin House.

The learned judge left it to the jury to say whether the defendants had sustained the issue that there was false-swearing in the plaintiff's affidavit furnished to the defendants of the amount of loss and damage sustained by him on occasion of the fire. He asked them to consider whether, if there was false-swearing, it was wilfully done, and in that event directed them to find for the defendants, reserving leave to plaintiff to move to enter a verdict for him for £137, the value of the damage to the shop furniture and fixtures, as to the amount of which there was no dispute. The jury retired at night, and in the morning gave their verdict for defendants.

In Easter Term, *Eccles*, Q. C., obtained a rule *nisi* for a new trial, on the ground that the verdict was contrary to law and evidence; that the jury were misdirected in being told that the fact of entries or non-entries by the plaintiff of goods at the custom house were material; that such evidence is inadmissible, and on affidavits. The affidavits stated, 1st. That there was one S. B. on the jury to whom the plaintiff's counsel objected, on the ground that he had just before sat upon a jury in a cause pending between the same plaintiff and the Royal Insurance Company, in which the facts, circumstances, and evidence were precisely the same as in this case, and had there expressed his opinion against the

plaintiff, and had made up his mind to give a verdict against the plaintiff in that case, and therefore was not an impartial juror. And, 2nd. The plaintiff made affidavit that he did not much understand the English language; that on his examination at the trial many questions were put to him tending to lay him open to a criminal prosecution, which, under the advice of council, he did not intend to answer. That a series of questions were put to him, to each of which he said, "I do not remember," thinking that thereby he said the equivalent to "*je n'ai pas de réponse à donner*," which, as he has been informed, ought to have been expressed in English, "I have no answer to give." That the answer, "I do not remember" prejudiced his case before the jury, making it appear that he had no recollection of any thing which might make against him, whereas his memory was good, but acting on his counsel's advice, he did not think it proper to make replies to the questions put. That a deficiency in power to express himself in English caused him thus erroneously to answer the questions put. That the verdict is unjust, and, if allowed to stand, will be ruinous to him. That if a new trial is granted, he will be able to prove not only the quantity of goods in his store at the time of the fire, but through Messrs Rheins of Paris, in France, from whom he made all his purchases, the value of the same. The plaintiff's statement of his imperfect knowledge of English was corroborated by three affidavits.

Cameron, Q. C., and *Galt*, shewed cause.

R. Harrison supported the rule.

No authorities were cited. The case was argued on the merits as appearing on the evidence. The point with respect to the jury was not dwelt upon, nor the inadmissibility of the evidence of the entries made at the custom house.

DRAPER, C. J., delivered the judgment of the court.

I think the case has been properly rested on the facts as proved at the trial. If any one of the jury were legally open to exception (which I do not at present see) I do not understand that the plaintiff was obliged to proceed to trial. The jury was special, and therefore was to that extent a jury

selected by the parties. If the juror objected to had been simply a salesman, he might have been challenged. The fact that he sat upon another jury to try a similar question in a cause in which the plaintiff elected to be nonsuited, is no reason to disqualify him, and no other was shewn.

Then as to the admissibility of the evidence. The entries made at the Custom House had reference to some of the goods in question. They were in the nature of declarations or admissions by the plaintiff of the quantity or value, or both, of the goods imported by him after the 30th of August, 1857. They cannot be the less admissible because sworn to, though the effect of the evidence is to place the plaintiff in this dilemma: either he made a misrepresentation as to value or quantity, or both, in order to diminish the amount of duties he should pay, and so to enhance his own profits, or he is now making a misrepresentation to enhance the claim he is making on the defendants. It is apparently difficult to reconcile the two statements upon any thing that appears. But it would have been impossible on any sound principle to have prevented the defendants from shewing the facts to the jury for their consideration. And it certainly affords an opening for the argument that in the shape in which the claim was preferred, the plaintiff virtually asserted that all his goods, lost, damaged or destroyed, had paid duty. The mode in which he calculated their cost at Toronto involves the claim to be recouped for duties paid on the goods, and if duties were never paid upon any part of these goods, the claim was so far excessive and unfounded, and the defendants had a strict right to shew this in evidence to rebut the demand.

Looking at the case as a question of evidence, I see no reason to doubt that on the plaintiff's case, standing alone and unanswered, there was abundant proof given to justify a verdict in his favour. The particular proof of the stock on hand on the 30th of August, and of the receipt of goods since, sustained by the general proof of the apparent estimated value of his stock, made by merchants and others who, from time to time, had seen it while his business was being carried on, would have warranted a jury in believing

that his goods at the time of the fire were worth from £5000 to £6000. The value of goods collected together after the fire was ascertained by three very competent appraisers, and from these data the conclusion would reasonably be, that the plaintiff's claim was sustained to the fullest extent. It is therefore to the evidence given on the part of the defence that we must turn in order to find the grounds upon which the jury have relied for their verdict. The proposition on the defendant's part is, that the claim as to the extent of loss is false and fraudulent, both, as I understand it, in representing that the plaintiff had more goods before and at the time of the fire, than was true in fact, and in representing that so large a quantity were lost or destroyed. The evidence on the first point consists principally in the facts, that, admitting the correctness of the statement of stock on hand on the 30th of August, 1857, the plaintiff made entries of goods imported for a value not amounting to £500, and in order to have done so, must have produced invoices at the Custom House, shewing the particulars of the several importations corresponding in amount with the entries made, which invoices are not produced or accounted for, and may, as is suggested, have been the invoice used, when the goods were imported, and called over by the two women in the plaintiff's employ, and that the invoices produced now are fraudulently made out to support his claim. That the plaintiff must have sworn to the truth of his entries. That the monthly average of plaintiff's sales, taken from his own accounts for the last 12 or 13 months, was about £350, where it was argued that it was improbable, that in a retail business of this character, and principally done by ready money sales, that late in December the plaintiff would have on hand so large a stock as £5,495, being an amount larger than his average sales for a whole year, and his business being one requiring a continuous supply of new goods to meet the usual demand for new fashions, and one in which it was his interest not to have a larger stock than could be readily disposed of, and that a much less stock would have been all that, as a prudent dealer, he would have had for a winter supply, and until his spring importations. And as to the destruction and positive

total loss of goods, they gave evidence to lead to the conclusion that so large a quantity could not have been stolen away. That the police were on the spot almost, if not quite, as soon as the doors of the shop were opened and goods removed, and were on the look out to see where they were taken. That in the opinion of one witness from one-half to three-quarters of the goods saved were of those entered on the stock book of the 30th of August. That plaintiff himself was present handing some of his valuable goods to known parties ; and that directly after the fire, the following day, he gave a very different statement of the estimate he then formed of the extent of his loss. The plaintiff had submitted to the jury in evidence that in a very small box or package, easily concealed, goods, such as laces and jewellery to a large value might be packed ; but this was met by the observation, that there was neither time nor opportunity for dishonest people to make a selection of that description : the very attempt would probably have insured detection ; and it does not appear by the learned judge's notes, if that fact would make any difference, that the laces and jewellery, so produced at the trial, either formed part of the plaintiff's goods, or that he had goods of a precisely similar description in his shop, which could have been so carried off.

Assuming that the evidence ought to have been submitted to the jury, a point on which I entertain no present doubt, no complaint is made of the manner in which the case was left to them. It is quite probable that the jury were greatly influenced by the plaintiff's own declarations as to the importations made by him when he entered them at the custom house, and may have thought that when so large a claim was advanced as for goods lost or stolen in removing them from the shop, and when the fact of his having so large a stock was questioned upon grounds which cannot be considered as light or trivial, that they ought not to assume, for the purpose of determining this question in his favour, that he had either used false invoices and supported them by false declarations upon oath, or that he had smuggled the goods in without entry, and thus evading the payment of duties.

And to this latter conclusion there was the further objection that he was claiming compensation and indemnity from the defendants on the footing that the duties on all the goods had been paid. These considerations are not affected by the facts more ingeniously than ingenuously put forward, that the plaintiff's imperfect knowledge of English occasioned him to make use of terms conveying a different meaning from what he had intended. For it is not urged that he designed or desired to enter into any explanation or statement which would repel the suspicion of his having used false invoices or made false entries and false declarations to support them, or that he had not in his claim upon the defendants assumed and virtually asserted, though not in so many words, that on the goods for the loss of which he required them to pay, he had paid the duties. The substance of his statement is: I inadvertently used language from which it would appear that I could not remember how, where, and under what circumstances I had made entries at the custom house relative to goods imported by me. I remembered all about it, but for reasons of my own I did not choose to give the information, and I meant to say that I availed myself of my legal privilege to withhold it. I think it probable, most probable, that the jury so understood him. It certainly was open to them to draw the conclusion that the plaintiff had defrauded the revenue in regard to these goods, or some of them, and that he was, notwithstanding, demanding payment from the defendants as if the duties had been paid. If so, it established fraud attempted on the defendants by the plaintiff, and if so, their verdict is neither against law nor evidence.

The plaintiff has not moved on the leave reserved to enter a verdict for the value of the shop fittings and furniture. I do not therefore touch upon it.

Upon the whole case, I think we ought not to interfere. The question was fraud, and it was properly submitted to the jury. It is apparent to me that there is evidence which will sustain their conclusion, and, taking the most favourable view for the plaintiff, which will fully sustain it. I perhaps attach more weight to the evidence relating to the custom

house entries than even the jury did, but as the jury, upon that no doubt, though very likely also upon other grounds suggested by the evidence, have found for the defendants, I feel no disposition unnecessarily to overrule their decision. Their verdict no doubt is a most serious matter to the plaintiff, but they were as fully sensible of the consequences as we can be, and we ought not, in my opinion, upon the facts before us, to diminish the weight of the lesson which this verdict gives to a party whose conduct may give rise to a well-founded belief that he has either defrauded the revenue or has attempted to defraud his insurers.

Per Cur.—Rule discharged.

ARNOLD V. ROBERTSON.

Bill of sale—Consideration.

Held, that a bill of sale, (registered under the statute,) for the money consideration of five shillings, with a separate declaration of trust referred to and forming part of the instrument (not registered), was invalid, and that the conveyance registered must shew the true and full consideration for which it is given.

INTERPLEADER issue—to try whether certain goods taken in execution by the sheriff of Leeds and Grenville, under a *fi. fa.* tested the 24th of February, 1858, and delivered to him on that day, against the goods of Lothrop & Wilson, were on that day the property of the plaintiff as against the defendants.

The trial took place before *Burns, J.*, in April last, at Brockville. It appeared that on the 10th of February, 1858, Lothrop, named in the interpleader issue, in consideration of five shillings, granted, bargained, sold and assigned to the plaintiff the goods and chattels in question, enumerated in a schedule, and which were then in the shop or storehouse on Main-street, in Brockville, occupied by Lothrop, *habendum* to the plaintiff, his executors, &c., to his and their use for ever, subject to and upon the trusts expressed in a certain indenture of assignment and trust, bearing even date, and having reference to the bill of sale, and made between Lothrop of the first part, plaintiff of the second part, and the several creditors therein referred to of

the third part. An affidavit, in proper form of the execution of this bill of sale was made on the same 10th of February, by a subscribing witness thereto, and the plaintiff also made affidavit, that the sale, in such bill of sale, "is *bonâ fide* and for good consideration, as set forth in the said conveyance, and for the benefit of the creditors of the said bargainor, and not for the purpose of holding or enabling the plaintiff, the bargainee, to hold the goods mentioned therein against the creditors of Lothrop the bargainor. And a copy of the bill of sale, sworn to be a true copy, and with these two affidavits annexed thereto, was filed in the office of the clerk of the county court on the following morning, the 11th of February.

The "indenture of assignment and trust," of the same date, was also proved. It recited that Lothrop was indebted to the several persons named in the schedule annexed to the said indenture, and marked A, in the sums set opposite their respective names: that he was unable to pay, and deemed it advantageous to his creditors to assign the debts, goods, chattels and effects thereafter mentioned, to plaintiff, upon the trusts therein expressed: that Lothrop had, by bill of sale of same date, transferred and assigned to plaintiff the goods and chattels therein mentioned upon the trusts, in the now stated indenture, and in consideration of the premises and of five shillings, granted, bargained, sold, assigned and set over to plaintiff, his executors, &c., all debts, &c., set forth in schedule B, thereto annexed, together with the goods specially mentioned and set forth or referred to in the said bill of sale, *habendum* the said debts, &c., together with the said goods, &c., to plaintiff, his executors, &c., henceforth and for ever, upon trusts thereafter set forth. Then came a recital that Louis C. Lothrop had indorsed or become party to divers notes and bills stated in schedule C, for the accommodation of his father the assignor. The trusts are declared to be, to sell the goods, chattels and effects specified in the bill of sale, and to collect the debts assigned, and to apply the proceeds, first, in payment of necessary and incidental expenses, second, to pay the balance due on an execution against the goods of Lothrop,

issued by Samuel Flint, and of a promissory note made by Lothrop, and indorsed by plaintiff for Lothrop's accommodation, for £100: third, to pay the bills and notes set forth in schedule C (£2974 8s. 4d.): fourth, to apply the residue towards payment of the debts in schedule A, due to such of the creditors as execute the assignment rateably: lastly, to pay the surplus to Arnold—Arnold to be discharged from all further liability to the creditors who execute the assignment. This deed of assignment and trust was not filed in the office of the clerk of the county court under the statute.

As soon as these instruments were executed, Lothrop made a formal delivery of part of the goods to plaintiff in the name of the whole: the plaintiff then went away, and the goods so delivered were replaced where they had been before: the next day (11th of February) the plaintiff gave Lothrop a power of attorney to sell the goods: there was no visible apparent change, for Lothrop remained in possession as he had done before, selling the goods: Lothrop's son was clerk to him (as the father swore) at a salary of £200 and his board, and had no interest in the business: he had some property of his own: it was proved that he had run away since the assignment, and the father said he had taken money with him, he could not tell how much: Lothrop's liabilities were £7000: the stock, &c., he assigned he valued at £3000, and he said that he found his accounts short upwards of £4000 from the account of his money: he had stated to one witness that his son had taken away some \$16,000 of money. On the defence it was objected that there had been no actual or continued change of possession, and that being so, the bill of sale and its filing were not a compliance with the statute, so as to vest the property in the plaintiff as against the defendants, who were proved to be judgment creditors: that the trusts should have been set out in the bill of sale, or that the instrument containing the trusts should have been filed also. The learned judge reserved the question,² whether a compliance with the statute to pass the property was sufficiently proved. He directed the jury that the evidence did not establish a change of

possession, and he left it to them to say whether the deed of assignment was fraudulent or no. That if the assignment were made *bonâ fide* for the benefit of creditors as is expressed therein, it would be legal, although it gave a preference to one set of creditors. The jury, on this direction, gave a verdict for the plaintiff, and the defendants had leave reserved to move to enter a verdict for them on the objection taken to the bill of sale.

In Easter Term, *A. Richards* obtained a rule to shew cause why a verdict should not be entered for defendants on the leave reserved, on the following grounds:—

1. That the original bill of sale, instead of a copy, should have been filed in the office of the clerk of the county court.

2. That the true consideration for the bill of sale was the trusts declared in the deed of assignment and trust, and therefore that deed or a copy thereof should have been filed in the clerk's office, or the trusts therein declared should have been fully set forth in the bill of sale, or in the copy filed.

3. That the affidavit of the plaintiff annexed to the copy of the bill of sale filed, does not shew the consideration, nor swears to the consideration mentioned therein. If the consideration be only the five shillings, the affidavit is untrue, for that consideration never was paid, and the affidavit refers to a consideration not expressed in the bill of sale, viz., “for the benefit of the creditors of the said bargainer.”

Or why there should not be a new trial for misdirection, in allowing the plaintiff to prove any other consideration than that expressed in the bill of sale, viz., five shillings, which was not paid; and in directing that there was evidence of a good consideration for the said bill of sale, and upon the law and evidence.

Cameron, Q. C., and *Sherwood*, Q. C., shewed cause. They urged that neither the first nor the third objections had been taken at the trial, and therefore the plaintiff should not be allowed to take them on moving to enter a verdict for defendants. That this was an assignment for the benefit of creditors, and therefore did not come within the statute 20 Vic., ch. 3, and that at common law it was good.

They cited *Heward v. Mitchell*, 10 U. C. Q. B. 535, 11 U. C. Q. B. 625.

A. Richards, in reply, cited 15 U. C. Q. B. 421, *Olmstead v. Smith*.

DRAPER, C. J.—Since the case of *Heward v. Mitchell* (11 U. C. Q. B. 625), which has been followed in this court, it is not a question open to argument that sales or assignments of goods for the benefit of creditors, and in trust to dispose of the proceeds thereof in payment of the creditors of the assignor, are not within the statute. And in this case the instrument in question purports and professes to be a bill of sale, for a consideration of five shillings, though the *habendum* is said to be upon certain trusts set forth and expressed in another instrument.

I confess I do not feel pressed with the difficulty suggested against holding that assignments in trust for the benefit of creditors are within the act. The statute requires an oath from the bargainee “that the sale is *bonâ fide* and for good consideration as set forth in the said conveyance, and not for the purpose of holding or enabling the bargainee mentioned therein to hold against the creditors of the bargainor,” and it is argued that a bargainee in trust for the benefit of creditors cannot take this oath, because the very object of the conveyance is to enable him to hold against creditors. But taking the matter in that sense, the same thing might be said of a bargainee for full value, who bought in order to become the true owner of the property, and with full knowledge that unless he immediately made the purchase, the creditors of the bargainor would seize the goods. We must read the statute as meaning that the bargainee should swear that the object of the conveyance was not (merely) to enable him to protect or to hold fraudulently or colourably these goods for the benefit of the bargainor *against* his creditors, and the *bona fide* assignee in trust for creditors could safely swear this, for the object is not that he should *hold* the goods *against* creditors, but that he should sell them for the payment of debts due to them.

It is conceded that this bill of sale can only be supported

under the statute, as the want of any change of possession, actual and continued, could not otherwise be got over. But we must, I think, consider, whether looking at the instrument itself, it is a good conveyance, not simply in form but in substance. It purports to be a bargain and sale for a money consideration, of certain enumerated goods and chattels. The money is five shillings, the value of the goods £2000 or £3000. We may safely conclude that if the only question for a jury were, whether a sale by a man owing more than his effects would pay, and pressed by creditors, in fact such a sale as this in those respects, was *bonâ fide*, that they would determine the contrary. But the defendants' counsel rely for the validity of the transaction on the words immediately following and qualifying the *habendum*: "subject, nevertheless, to and upon the several trusts, conditions, ends, intents and purposes expressed and set forth in a certain indenture of assignment and trust, bearing even date herewith, and having reference to the bill of sale, and made between the same parties of the first and second part, and the several creditors therein referred to of the third part. The mere fact that the bill of sale was subject to trusts, would not make it valid, for the trusts might be altogether, or to a very great extent, for the benefit of the bargainor; as, for instance, to sell the goods immediately, and apply the proceeds to the payment of some comparatively small debt or debts, and to pay the surplus (the larger part) to the bargainor. It would necessarily be a question for a jury; but it is to be assumed they would hold the reservation for the bargainor a fraud on other creditors, and therefore that the bill of sale was void. It makes it necessary, therefore, to see what the trusts are, and I think to read them as part of the bill of sale, in order to judge whether the conveyance be a fraud or no. But if this be necessary in order to give validity to the bill of sale, the question arises whether we can hold it a substantial compliance with the statute to file that instrument only, which only partially expresses the nature of the transaction between the parties. I am apprehensive we should give facilities to fraud if we determined that the conveyance

might be thus divided into two parts, one confessedly ineffectual without the other, and yet the ineffectual part to be the only one filed, and so open to all parties desirous of information. The legislature have required, by the 4th sec. of the act, that every such instrument shall contain such an efficient and full description of the goods and chattels, that they may be readily and easily known. In *Hutchison v. Roberts* (7 U. C. C. P. 475), I expressed my doubt whether the words "all my stock-in-trade, goods, wares and merchandize in my store, situate at," &c., would be a compliance with the act, and whether the instrument itself should not contain the description, or at least have annexed a schedule of the goods, which should be referred to as part thereof. I cannot say, that if the only description was, "all my stock-in-trade, goods, wares and merchandize mentioned in (or in a schedule annexed to) a certain indenture of assignment and trust," (referring to it exactly as in the present bill of sale), I should think it sufficient, and I have great difficulty in finding a reliable distinction between that case and the present. For the argument resolves itself into this, the trusts upon which the sale and transfer of the goods is made operate as a consideration to support the bill of sale. The facts that Lothrop was indebted and was desirous to assign his property and effects for the satisfaction of his creditors, are set forth in the indenture of assignment and trust, and are declared to form part of the consideration for that instrument, and we are in effect asked to give the same effect to the declaration, that the bill of sale is subject to the trusts in that other indenture, as we should be called on to give to the considerations on which that other indenture is made, as the foundation of the trusts. If we are to read both together as constituting one conveyance, then the reasonable inference is, that the whole should be filed, unless the bill of sale is sufficient by itself to pass the property without an actual and continued change of possession. And unless a nominal money payment of five shillings can be held to be a "good consideration," there is no other "set forth in the conveyance," as a consideration for the sale. If the trusts referred to are to be treated as *part of the con-*

sideration, then they are not set forth in the conveyance, and the statute appears to me, as much to require that the consideration should be set forth, as it does, that there should be an efficient and full description of the goods. The observation that I made in *Hutchinson v. Roberts*, I may repeat as applicable here. "All that can be said is, that the case falls within the maxim *id certum est quod certum reddi potest*, but that was the law before the statute, and we must suppose the legislature intended to require a greater degree of certainty than might have sufficed before."

I conclude, therefore, that if the question submitted to the jury had simply been, whether a bill of sale by a debtor to a stranger of goods worth some thousands of pounds for a consideration of five shillings, was *bonâ fide*, and not a fraud on creditors, they would unhesitatingly have held the negative. That the reference to the trusts set forth in the other indenture must, if operative to sustain such bill of sale, have that effect, by importing an additional good and sufficient consideration, and that under the statute 20 Vic., ch. 3, such reference could not be treated as having that operation, because the consideration which supports the bill of sale should be set forth therein, and a reference to another instrument (especially when that is not filed) as connected with the bill of sale is not such a setting forth of the consideration as the statute makes necessary when it requires the affidavit to state that there was a good consideration set forth in the instrument.

Strictly this is a matter to be submitted to the jury; but the facts are not capable of dispute or alteration, and I think upon them the bill of sale should be held void.

HAGARTY, J.—I feel some difficulty in deciding the main point in this case. The statute is singularly silent as to any description of the kind of instrument required. The second clause directs that it "shall be in writing, and such writing shall be a conveyance under the provisions of this act." Sec. 4 directs that all instruments mentioned in this act shall contain such efficient and full description thereof, that the same may be thereby readily and easily known and dis-

tinguished—no other description of the instrument is directly given. The 2nd clause directs that the bargainee shall make oath that the sale is *bonâ fide* and for good consideration, as set forth in said conveyance, &c., &c. Now, this seems to be the only statutable direction or provision as to a statement of consideration.

But taking the object of the statute into consideration, and the evils it seems designed to remedy, I think we may safely assume that the document registered should state the true consideration, and that a statement of a nominal consideration of 5s. alone, in such a case as that of the debtor now before us, not even alluding to the existence of any other consideration, is not sufficient.

I cannot think the reference to the trusts in another instrument at the end of the *habendum* can be relied on by the bargainee as satisfying the words or spirit of the act.

I think the rule should be made absolute for entering verdict for defendant.

Per Cur.—Rule absolute.

STONEBURGH V. MUNICIPALITY OF BRIGHTON.

Contract—Liability of Corporation—Right to Recover.

Held, that where plaintiff performed certain public work under contract not made with the municipality, or with any of its known officers, but merely with persons in their individual capacity assuming to act as a duly appointed committee, no action lies against the corporation.

DECLARATION for work, labour, and materials, done and provided by plaintiff for defendants at their request, and on an account stated. *Plea*, never indebted.

The case was tried before *Draper*, C. J., at Cobourg, in April last.

The plaintiff proved that in the latter part of the year 1856 certain inhabitants of the village of Smithfield, in the township of Brighton, petitioned the municipality of that township respecting the necessity of making some improvements on the bridge across the creek in that village, representing that such repairs were absolutely necessary, and hoping the municipality would appoint a committee for the purpose of

superintending the work, and further stating that the bridge in question was the only portion of the road the inhabitants were unable to keep in repair. On the 6th December, 1856, it was resolved by the Municipal Council,—“ That the prayer of the petition be granted, and that Messrs. Abigail Smith, Henry Vantapel, and William Dravey be appointed a committee to superintend the said work.” None of these three were members of the council; no other entry respecting the matter appears on the corporate books; in a by-law imposing all rates and assessments on the township for the year 1857, this bridge or work was not mentioned, for it imposed a gross sum, composed of items which had been discussed in the Council and approved. The sum required for different purposes were estimated for, and if adopted, were put into the gross sum. The Clerk of the Council said he thought £75 had been estimated for, for the bridge, on a loose piece of paper written by one of the Councillors, but he could not swear it was included in the rates imposed; he thought it had been struck out. One of the Township Councillors swore that the matter was talked of in the Council in 1857, but nothing whatsoever was reduced to writing. He said £75 for this work was included in the gross sum imposed by the by-law spoken of, and that the money had been raised, that is, all imposed by the by-law, he thought, but he did not know it positively. In December, 1857, a demand was made on the Council for £82 10s. for this work, and the Council resolved, “ That the Reeve be authorised and required to take legal advice on the resolution appointing a committee to construct a bridge at Smithfield, and if this Council is found liable, that he be authorised to draw an order on the Treasurer in favour of Coulter and Bates for the sum of £82 10s, for the construction of said bridge, and said order to be made payable on the 20th January, 1858.” There is no other by-law, resolution, or minute of any kind on the subject.

The committee, however, proceeded and got a plan and a specification for building a stone bridge, and grading the road approaching it for a distance of 25 rods one way and 30 rods the other, and for making 108 feet of railing on each

side, and employed plaintiff to execute it. One of them proved that they got no specific directions from the Council as to the nature of the work, nor was any sum mentioned as the limit of expense. They did not even receive a copy of the resolution appointing them, but signed the specifications produced in their own names, and the plaintiff signed them also, in which there was no reference to the municipality. No written contract was produced, or any other memorandum in writing except the specifications, but they, the three persons named in the resolution, engaged the plaintiff to do the work according to a plan and these specifications for the sum of \$330. It was proved that the work was not yet finished, ten or fifteen days' work remaining to be completed, which they thought it better to defer until the spring. The price was sworn to be reasonable, and the work which was done was good.

On this evidence, the learned judge nonsuited the plaintiff, reserving leave, by consent, to move to enter a verdict for him for £75.

In Easter Term, *Patterson* moved to enter a verdict for plaintiff on the leave reserved.

In Trinity Term *A. Richards* shewed cause, he cited *Cope v. Thames Haven Dock and Railway Company*, 3 Exch. 841. ; *Randell v. Trimen*, 18 C. B. 786. ; *Australian Steam Navigation Co. v. Marzetti*, 11 Exch. 228. ; *Henderson v. the Australian Steam Navigation Co.*, 5 E. and B. 409. ; *Reuter v. the Electric Telegraph Company*, 6 E. and B. 341.

DRAPER, C. J., delivered the judgment of the court.

On this application we have to determine whether the evidence given by the plaintiff shows him entitled to recover the sum of £75. If entitled to recover at all there seems no objection to the amount.

The latest decisions in England have established that when a corporation is a trading one, and as I understand especially where it is established for a special purpose, they are bound by a contract made in furtherance of the purposes of the incorporation, though not under their corporate seal.

The same doctrine and fully to the same extent has been

established in this province by the decision of the Court of Appeal in *Marshall v. the School Trustees of Kitly*, and *Pym v. the Municipal Council of Ontario*. We cannot, therefore, entertain any objection for the mere want of a contract under seal to charge the defendants as a corporation. But there are other difficulties in the way. I am not prepared to admit that the Township Council can, by resolution, delegate to third parties power to bind them by contract for purposes which the legislature have specially entrusted to the Council, and enabled them to execute by the passing of by-laws.—*Ramsay v. Western District Council*, 4 U. C. Q. B. 374.

The plaintiff did not contract with any known officer or servant of the Municipal Corporation. He does not appear even to have entered into a formal contract with the three persons named in the resolution, though it appears that he and they signed the specifications, they signing as individuals, not as acting under or for the Municipality. The resolution under which alone they could assume to act, for the Municipality is not referred to, was not, for all that appears, communicated to the plaintiff, and it is not shewn that in dealing with them he had any ground to suppose he was contracting with the Corporation; they may have told him so, but it does not appear that he ever enquired how it was.

If, therefore, there is a liability on the part of the Municipality it must arise from their subsequent adoption of the contract, or a receiving of the work. The evidence was insufficient to establish a liability founded on either of these assumptions. I thought, if in fact there had been an adoption of the contract and the work done, by an appropriation of a sum on account of it, after it was so nearly brought to a conclusion, it was a matter capable of easy and direct proof; whereas, though it was proved to have been submitted for consideration to the Council, of the two witnesses who spoke of it, one thought it had been struck out of, and the other was not certain, though he thought it had been included in, the gross sum to appropriate which a by-law was passed. I did not think this sufficient, and I said so, and I was not asked to submit it to the jury, and now the motion is

not for a new trial, but to enter a verdict for the plaintiff on the assumption that this evidence was enough to give him a right to recover. I still think it did not go far enough; the case struck me thus, when the resolution was adopted to grant the prayer of the petition, an aid to make some repairs and improvements was contemplated, which would enable the inhabitants of the locality to make the highway good. I do not believe the idea of building a new bridge and of grading the approaches for a considerable distance on each side was even then thought of. When the expense incurred by the committee became known, and it was proposed to make an appropriation for it, the appropriation was refused, because it was thought the expenditure was unauthorised, and that an unfair advantage was sought to be taken of the resolution appointing the committee, and I am confirmed in this view by the resolution which was afterwards adopted directing the Reeve to take legal advice as to the liability of the Municipality, and I conclude, therefore, that unless the committee had legal authority to bind them and did bind them to this payment on the work being done, the Council had not done any thing subsequently to bind them, and I continue of that opinion. As to any acceptance of the work, there was no proof whatever of it, except that it was conceded that the public used the bridge as part of the highway which had theretofore been in use, and this I thought formed nothing on this point for the plaintiff.

I think the rule should be discharged.

YOST V. CROMBIE.

Personalty—Executor.

Held, that an executor is entitled to take the personal property of the testator at its value for a debt due by the estate to him, and a purchase made by an executor at a public auction of the testator's personal estate, in lieu of money due him, held valid.

This was an interpleader issue, tried at Berlin, at the last spring assizes, before *Hagarty, J.*

The facts material to the decision of the question submitted to the court, were as follows: The plaintiff's father died intestate, leaving considerable personal property: the

plaintiff and his mother took out letters of administration : they employed an auctioneer to sell the goods, and the plaintiff, bidding as other people did, purchased some stock, horses and cattle : he was a creditor of his father's estate to an amount exceeding \$250 : no objection was urged to the *bonâ fides* of the sale, or of the purchase by plaintiff : the defendant was a creditor of the estate, and having recovered judgment, issued a *fi. fa.* against goods, and the sheriff, among other things, seized under that writ the goods which the plaintiff had purchased as above stated ; and the issue in effect was to try whether, after the sale and under the circumstances stated, these goods still were assets of the intestate's estate.

The point was argued by *McMichael*, for the plaintiff, and *D. B. Read*, for the defendant.

DRAPER, C. J., delivered the judgment of the court.

I think our judgment should be in the plaintiff's favour.

It is true, as a general rule, that an executor cannot be allowed, either immediately or by means of a trustee, to be the purchaser from himself of any part of the assets, but shall be considered a trustee for the persons interested in the estate, and shall account for the utmost extent of advantage made by him of the subject so purchased.—*Hall v. Hallett* (1 Cox. 134), *Watson v. Toone*, (6 Madd. 153). This doctrine rests on the ground well established in equity, that no trustee or person filling a fiduciary relation, shall be allowed to make a profit to himself by the purchase, sale or use of the property so entrusted to him.

There are, however, many cases in which the executor may become the owner of the personal property of the testator (*Wentworth off. of Exor.*, 31, 32, 89), as for example by retainer for his own debt, and there he may make election and declaration what part of the testator's goods, not exceeding the debt due to him, he will have to be his own, though there will be no alteration of the property without such election, by the mere act and operation of law. (*Williams Ex.*, 936). The right, however, to retain is well established, and he is not obliged to sell the assets and pay

himself out of the money, but may retain the assets themselves. So if the testator's plate was pledged to its full value, the executors might redeem it with their own money and retain it, (*Woodward v. Lord Darcey*, Plowd, 184), and if they pay debts of the testator's with their own money, they may retain his goods to the value as their own. The form of a sale by auction was no more than a mode of ascertaining the value of the goods which he took. And the creditor may test the matter, as to whether the goods seized exceed in value the sum for which the plaintiff had a right to retain, by suggesting a *devastavit*, if there is not enough to satisfy his claim out of the remaining assets of the estate, which appears a more reasonable mode of proceeding than by interpleader in a case of this description. Possibly, assets are admitted in the original action.

I think the rule should be made absolute to allow the plaintiff to add the goods so retained by him for his debt to those already found for him by the jury; because, on what appears, the plaintiff had a right to retain goods in specie to satisfy his own claim, and the transaction appears, so far as I can see, *bonâ fide*, and because, if the plaintiff has actually, under colour of retaining for his debt, taken more than that debt justified, or more than with that debt, he can shew he has paid out of his own moneys on account of the estate, he may be made liable by a proper proceeding *de bonis propriis*.

Rule absolute.

WALKER V. THE GREAT WESTERN RAILWAY COMPANY.

Railway—Highway—Damages.

Held, that a railway company are not bound to maintain any but the usual and direct road for access and egress to and from their station; and a passenger, taking an indirect road which had not been appropriated to the purposes of a foot-way, cannot hold the company responsible for damage or accident occasioned thereby.

The declaration states that defendants were proprietors, &c.: that they opened and maintained a road across their lands leading from the highway, known as Bay street, in the town of Woodstock, for the use of passengers to pass

and re-pass from Bay-street to the passenger station, in the usual course of the defendants' business, and at the request of defendants. And defendants constructed a switch-track thereon, across the said road, and excavated the earth, across and near the said road, and near the entrance of the passenger station; and afterwards wrongfully suffered a large quantity of ice to form and remain, upon and near the said road, on either side thereof, and near the door of the passenger station; and wrongfully placed a freight car across the said road, near the door of the passenger station; and obstructed the road, and wrongfully permitted the road, near the door of the passenger station, and where the switch was laid, the freight car was placed, and where the ice was formed, and where was cut and excavated, to be insufficiently lighted and guarded or fenced to prevent accident to passengers using the said road, whereby the road was obstructed and passengers were liable to accident in passing along the road to and from Bay-street. And by means of the premises, and of the breach of duty of the defendants, as aforesaid, the plaintiff, on, &c., in the night-time, having arrived as a passenger on defendants' railway, at Woodstock, and while passing along the said road from the passenger station to Bay-street, was obstructed by the freight car, and fell on the ice, and slipped into the excavation, whereby his leg was broken, &c. 2nd count, for money paid by plaintiff to the use of defendants. Pleas—1. (to first count). Not guilty, &c. 2. Plaintiff not a passenger as alleged. 3. (to second count). Never indebted.

The trial took place at Woodstock, in March last, before *Hagarty, J.* It appeared that the railway station is a considerable distance south of the railway track: that the main track is south of the station, and that north of the station there is a switch, constructed for the convenience of defendants' business: that there is a way leading from Woodstock, by a bridge across the track, and that this way is always used by carriages conveying passengers to and from the railway station: that by getting on the platform on the south side the station-house, the side where the train always comes in, passengers can go to any part by the

bridge without crossing the switch or track: there is a door on the north side the station-house, and there is a difference of two or three feet between the level of the door and the level of the switch, and there are four steps, eight feet broad, constructed for passengers or others going that way out of the station, to pass from one level to the other, descending from the station to the level of the switch: persons going this way after crossing the switch come to a path leading into Bay-street, across defendant's land, and so into Woodstock: on the night of the 16th of January last, the train arrived at Woodstock about half-past eight: it was very dark: there was sufficient light afforded on the south side of the station for the use and assistance of passengers and others going that way: on the north side there was no light, and upon the switch and opposite the steps spoken of stood a freight car some 28 feet long: apparently the plaintiff went out at the north door, and finding this freight car standing on the switch, and just where passengers, who desired to go this way towards Bay-street, were in the habit of crossing the switch: he attempted to descend to go round the car: there was a good deal of ice on the ground on the side of the steps, and he seems to have fallen, in his attempt to pass that way, and was found lying there with his leg broken: it was stated by some of the witnesses that if the freight car had not been on the switch at that particular spot where the steps were, there would have been no danger, but not being able to use the steps, the plaintiff went where all the ice had collected and fell as above stated: two or three days after this accident the car was removed.

On the part of the defence it was objected that the defendants might shut up the road when they pleased: that they were not liable for the consequences of the plaintiff on finding the usual way or road from the north side of the station-house obstructed, taking a course of his own: that the defendants had a right to place cars upon this switch, and that plaintiff himself was guilty of neglect.

The learned judge inclined against the plaintiff, but left the case to the jury, reserving leave for defendants to move to enter a nonsuit. He put certain questions to the jury,

which they did not answer, but they gave a general verdict for plaintiff £50.

In Easter Term, *Anderson* moved for a nonsuit on the leave reserved.

D. G. Miller shewed cause, citing *Seymour v. Maddox*, 16 Q. B. 326; *Blakemore v. Bristol & Exeter R. Co.*, 31 L. T. 12; *Torney v. London & Brighton R. Co.*, decided in the court of C. P. in England, in November last, 27 L. J. C. P. 39, and after the argument he referred to *Corby v. Hill*, reported in the *Journal* of the 12th of June last, page 512; *Martin v. Great Northern R. Co.*, 16 C. B. 179.

DRAPER, C. J., delivered the judgment of the court.

The declaration seems to me, to rest upon the assumption that it was the duty of the defendants to keep and maintain this road or way, from the north side of their station at Woodstock to Bay-street, for the use and convenience of passengers going to and from the railway station and cars. This lies at the foundation; for if there was no such duty, the residue of the matter complained of falls to the ground. But I see nothing creating any such duty or imposing such an obligation. That they must provide convenient access to enable passengers to reach and leave the cars at the railway station, is unquestionably their interest, and is, I think, also their duty; for people have a right, paying their fares, to be conveyed on the railway, and must, therefore, have a right of convenient access to and fro. And the evidence shews that such an approach was afforded, and that there was a safe, convenient, and well lighted way, by which other persons did go on the night in question, and by which the plaintiff might have gone. It was proved the night was very dark: that the way on the north side was not lighted: that the plaintiff must in all probability have seen the obstruction created by the railway car, and the presumption is, and so he in fact asserts, that not being able to use the usual way or road, owing to this obstruction, he deviated from that line, and endeavouring to take another, met with the accident.

I think there is nothing disclosed in the declaration which makes it the duty of the defendants to make or maintain that particular way, or which prevented them from stopping it altogether if they pleased. The construction of a switch there, was lawful, and the use of it for freight cars was lawful also. The plaintiff was under no necessity to have gone that way or to have incurred the risk which caused him the accident. Finding the obstruction and the darkness, he should have taken the other course, which was safe and lighted, and cannot treat his own persisting in endeavoring to go by this road or way, as an act resulting from any necessity imposed by the defendants' conduct, nor yet complain of a breach of duty on their part without first shewing their obligation to open or keep open this particular road. Although many persons had used this way as a short cut to go on foot, it does not appear that it was set apart or opened by the defendants for this purpose. On the contrary, they made this switch directly across it.

The action as in *Martin v. The Great Northern Railway Co.* (16 C. B. 179), is an action of tort, founded certainly upon a contract with every passenger who uses their cars and railway; although in this case the declaration is not precise in setting out that the plaintiff was a passenger for hire to be paid to the defendants, and charging a duty as resulting therefrom. At first sight that case might appear decisive of the present, but it obviously was decided on a particular ground; the course taken by the defendants' counsel at the trial mainly influencing the court in refusing to set aside the verdict. They intentionally kept out of view the question whether the plaintiff in any degree contributed, by his own want of care, to the accident which was the foundation of his action. Now the defendants' counsel have not so tied their own hands in this case, as I understand, and the question whether there should be a nonsuit or not, was raised upon the ground that the plaintiff's own evidence shewed he was guilty of the negligence which caused the accident. The jury virtually declined giving any answer to the questions submitted to them by the learned judge, but the small amount of their verdict is strong to shew what they really

felt, for if they had attributed the injury which plaintiff suffered (a broken leg) to the sole negligence and breach of duty of the defendants, it is impossible to conceive they would not have given a larger verdict. I think the plaintiff, finding the way he was seeking by the steps obstructed, and not being under any necessity to go that way at all, and having, strictly speaking, no right as against the defendants to use that way, took the chance of finding a short cut, by a route not set out for that purpose by the defendants, and one which was obviously dangerous, both from ice and also from the darkness, that he voluntarily incurred an unnecessary risk in taking a way of his own, when the way he had before used was stopped, instead of going round by the bridge and by a way which was sufficiently lighted, and therefore I think he ought not to recover.

The case of *Corby v. Hill* is, I think, very distinguishable. In that the road which the plaintiff was using was opened for the use of all persons having occasion to go to the house there, by the owners of the house and property. It was averred and was admitted that the plaintiff therefore was lawfully using the road when injured by the obstruction placed on it by the defendants, against which he ran unavoidably in the night-time, in going to the house. In the present case the evidence shewed a different way dedicated to the public use for the purpose of going to the railway station; and as to the way by which the plaintiff went, it appeared merely that the land not being enclosed between the north side of the station and the road leading into Woodstock, foot passengers frequently used it. But the defendants shewed the use to which they designed to appropriate it, by making the switch and track, on which they, from time to time, placed their cars as suited their convenience and business, the purpose for which such switch was created. In other words, the private way and the plaintiff's right to use it were the foundation of the plaintiff's right to recover in *Corby v. Hill*; while here the defendants contend they have provided another and different way, and that in fact the plaintiff was, in strictness, a trespasser in going over this part of their land.

If there was a plea traversing the existence of the land for public use, I should feel quite clear it ought to have been found in the defendants' favour; and the case has been argued before us as if it were open to the defendants to deny it; for at the trial and argument they have insisted on their right to use this land for their own business only, and to exclude the public from it altogether, having already provided sufficient and convenient access and egress to and from their station for all passengers.

Per Cur.—Rule discharged.

DEBLAQUIERE ET AL. V. BECKER ET AL.

Agency—Evidence—Misdirection.

Held, that the question of agency is a question of fact for the jury, there being some evidence to go to them of which the judge must decide; and, *Held*, that the entry of a party on the assessment roll as resident, when in fact he was a non-resident, did *not* render his assessment nugatory. *Held* also, that a statement and demand of taxes, are not a necessary condition precedent to uphold a distress for taxes in the case of non-residents.

REPLEVIN.—Declaration averring special damage from the taking of plaintiffs' goods.

Plea.—Not guilty, by statutes 16 Vic., ch. 182 (1853), and 14 & 15 Vic., ch. 59, sec. 5 (1851)—the plaintiffs' goods had been seized for taxes due to the municipality of Walsingham for 1857, defendants justifying as collectors.

At the trial before *Hagarty, J.*, at Simcoe. John Leighton was called for the plaintiffs, who proved the property seized to be plaintiffs. Plaintiffs had taken it the day before seizure, under a bill of sale given by a debtor of theirs. They were about selling it by auction on the morning it was seized by defendants. Evidence was given to shew special damage, which need not be further noticed here. Plaintiffs had carried on a large lumbering establishment at Port Rowen, in Walsingham, but had broken it up. Till within six months before the trial, they had an office in Walsingham. During 1857 plaintiffs lived at Woodstock, in another county. DeBlaquiere had lived formerly in Walsingham, and had been township reeve. One Beard was plaintiffs' agent at their office till it was closed. Witness had been for ten years in

Walsingham, doing business for plaintiff "off and on." In selling this property he instructed the auctioneer, by instructions from plaintiffs; had taken this property for plaintiffs' Bought and sold logs for plaintiffs: paid taxes for them in adjoining township of Houghton, and other taxes, such moneys being sent by plaintiffs to him. Bargained with persons for sale of plaintiffs' lands, and sold subject to their approval, and in one case left \$5 of purchase money which vendee for defendants claims for taxes. Sometime before seizure defendant Becker spoke to witness about the taxes, and said, "what is to be done about DeBlaquiere's taxes," mentioning the amount, £170 odd. Witness said he was writing to Woodstock, and would let him know. Becker was collector, Smith was bailiff; witness did not, however, inform plaintiffs: witness was winding up plaintiffs' saw log business, and selling their lands subject to their approval, and kept off trespassers: witness had no office: from a few days after 6th July, 1857, plaintiffs had no office or place of business in Walsingham. It was six miles from plaintiffs' mills, and in Port Rowen, where Becker spoke to witness about the taxes.

The auctioneer deposed that he was instructed by Leighton for plaintiff. Plaintiff DeBlaquiere had not lived in Walsingham for the last two years. Beard was plaintiffs' "chief boss:" since July plaintiff had no office there.

Beard deposed that he had been plaintiffs' agent; office closed 4th July; for several years witness had returned plaintiffs' property to the assessors: lands were returned as those of "Residents." In 1857 assessors sent the assessment, and Beard on 18th April, 1857, wrote to them in reply:—

"Gentlemen—Your assessment of our lots in Walsingham is correct, with the exception of lot 17, in 11th concession, which we shall be obliged by your taking out of our assessment, leaving total amount of real property £13089—Yours, &c.," "FARMER & DEBLAQUIERE—W. BEARD."

Paid some school taxes for plaintiffs: did not know the rate imposed for 1857: did not know amount till seizure.

On the defence, the township clerk proved that Becker was

collector under township seal, produced collectors' roll for 1857, plaintiffs' taxes mentioned there: assessed as residents £175 6s. 2½d. on £13789: roll given to collectors 3rd October, 1857: taxes to be paid by 14th December, time was afterwards extended to 1st May: roll not yet returned: seizure was on the 5th November: knew Leighton twelve or thirteen years: understood him to be plaintiffs' agent: Leighton admitted to witness that the taxes had been demanded of him.

One Browne deposed, that he had bought land from Leighton acting for plaintiffs: had been manager for them a long time, buying grain, hay, &c.

One Forsyth deposed, that in beginning of October, 1857, he saw Becker at plaintiffs' premises, Rowen Mills, where there office had been. Becker said he was collecting taxes: asked was there any one in plaintiffs' office, as he was demanding taxes; witness told him Beard was not at home, but was at Woodstock. He was there several times, witness supposed for taxes; witness paid his taxes there, having rented part of the premises. Beard had been down occasionally after July, but property, office, and all had been purchased by others.

On this the plaintiffs' counsel contended that no demand was proved on plaintiffs fourteen days before seizure; that demand must be personal, not on agent; that in any event Leighton was not an agent for such purpose.

For defendants it was urged that the fourteen days' demand was only directory, and that going to the residence or place of business was sufficient.

The jury were told what the act required in terms, that a demand of fourteen days before seizure must be proved, and they were asked to find if such a demand was made on plaintiffs or their authorised agent after the collector had demanded it at their last known place of business. The plaintiffs' counsel contended that the judge should himself decide that Leighton was not an agent on whom such demand could be made. The judge left the question as to Leighton being such agent to the jury on all the facts.

The jury found for the defendants.

In Easter Term, *Freeman*, Q. C., for plaintiffs, obtained a rule to shew cause why there should not be a new trial on the law and evidence, and for a misdirection, in leaving to the jury to decide whether Leighton was plaintiffs' agent, and in ruling that notice to an agent, not at the defendant's place of business, was a legal notice.

In Trinity Term, *M. C. Cameron* shewed cause, and *Freeman* supported the rule, citing 16 Vic., ch. 182, sec. 17.

DRAPER, C. J., delivered the judgment of the court.

I think the learned judge was bound to leave the question of agency as a fact to be decided by the jury: whether the evidence offered was admissible, and if admissible, whether there was really any proof whatsoever of the fact of agency, it was for the learned judge to decide. If he thought there was evidence, then it was for the jury; for the question of agency, is not, I apprehend, one of those preliminary questions, which a judge must himself decide upon in order to let in evidence to be submitted to the jury. Such as, whether a confession be admissible or no, on account of some alleged promise or threat under the influence of which it was given, or whether a party since dead made the declaration tendered in evidence, at a time when the conviction of his speedy death was present to his mind, or whether secondary evidence of the contents of a deed is admissible under existing circumstances.

Then, it appears to me there was evidence that Leighton was the plaintiffs' agent for the purpose of having this particular demand made upon him, and therefore the objection for misdirection fails upon both grounds.

Then it is objected that the names of the plaintiffs should have been entered on the roll as non-residents. That they were in fact non-residents is not disputed. That their names were entered on the roll with their agent, from which the jury might fairly infer a request on their part is, I think, sufficiently established by the practice of previous years, and by the letter of the 17th of April, 1857; the lands therefore would not come within the description in section 8 of 16 Vic., 182, nor under sec. 22, and no objection was urged, nor

indeed could there be, to the amount at which they were assessed. So that if it amounts to any thing, the objection is, that by not describing the plaintiffs as non-residents, the entry of their names, and the assessment of their property became nugatory. I think it sufficient to observe that the object of the proviso, requiring the words "non-resident" to be placed on the roll opposite the name of a freeholder, is chiefly if not exclusively designed to prevent his voting at any municipal election by reason of his name being on the assessors or collectors' roll. We might as well hold the assessment of the party void because his address was omitted from the roll, as because the words non-resident are omitted. I think neither omission *per se* prevents the collection of taxes.

But it is argued that the 41st section (16 Vic. ch. 182) makes it the duty of the collector to call at least once on the party taxed, or at the place of his usual residence, or domicile, or place of business, if within the collector's township, &c., and to demand payment, and if any person whose name appears on his roll shall not be resident within the municipality, he shall transmit to him by post a statement and demand of the taxes charged against him in the roll, and that as no such statement and demand was transmitted by post, the distress was illegal.

The letter of the 17th of April may be taken to be an answer to the notice transmitted by the assessors under the 23rd section of the act. It would state the actual value at which the real property was assessed. All therefore must turn upon the necessity, as a condition precedent to distress, of making a demand, or transmitting one by post, and if necessary upon the proof given thereof.

The plaintiffs were entered on the roll as residents. It is admitted they were not residents in fact, but I do not think, for the reason already given, that the assessment is void for this mistake of description. The collector's duty, however, differs according to the fact of residence or non-residence; the 41st section providing that "if any person whose name appears on his roll *shall not be resident within the municipality he shall transmit by post,*" &c.; this was precisely the plaintiffs' case. It depends, not on the description entered

on the roll, resident, or non-resident, which is material for the purpose of voting, but on the fact of being resident or no.

Then the collector should have transmitted them a statement and demand of the taxes charged against them in the roll. The 43rd section gives the power of distress. If any party neglects or refuses to pay for fourteen days "*after such demand made*" on him, referring in this case to actual residents, the collector may levy, "and *at any time after one month from the delivery of the roll to him,*" (which must be done on or before the 1st of October, sec. 39), "the collector may make distress, of any goods and chattels which he may find upon the lands of non-residents on which the taxes inserted against the same on his roll have not been paid, and no claim of property, lien or privilege thereupon or thereto, shall be available to prevent the sale or the payment of the taxes and costs out of the proceeds thereof." It is to be observed that this last provision does not say, after demand, or after transmitting a statement and demand, but after one month from the delivery of the roll to the collector. It is true, that this particular power relates to distress on the lands in respect of which the taxes were imposed, and this may well have been thought necessary, as the goods on such lands may not have been the property of the party assessed. But this provision taken in connexion with section 45, leads to the conclusion, that in case of non-residents, the transmitting a statement and demand is not a condition precedent to the power of distress, though the collector may be liable for any damage resulting from the omission to transmit it. The 45th section enacts that if any party taxed shall not be resident, or shall have removed, &c., or if any party shall neglect or refuse to pay any tax assessed in any township, &c., within the county in which he shall reside, it shall be lawful for the collector to levy such tax by distress, &c., of the goods of such party in any township, which for judicial purposes, shall be in the same county, and to which such party shall have so removed, or in which he shall reside, "*or of any goods and chattels in his possession therein.*"

The distress appears to me to be covered by this last provision, and I think the rule should be discharged.

Per Cur.—Rule discharged.

PARK V. BERCZY.

Evidence—Misdirection—Equity.

One R. F. transferred a schooner to the defendant, as trustee, to sell and pay certain creditors (himself among the number) debts due by him to them. A memorandum of defendant's was proved on the trial, admitting the receipt of certain moneys on this account, and appropriating it proportionately to the creditors. Upon an action brought to recover the amount so admitted the defendant's counsel contended that the transfer was in trust, and the remedy must therefore be in equity.

Held, that the defendant had admitted the receipt of a certain amount, and that the action was properly brought.

The declaration was for money payable by defendant to plaintiff for goods bargained and sold: for money lent and paid; and for money had and received for interest; and for money due on an account stated.

Pleas:—1st. Never indebted. 2nd. Payment. 3rd. *Actio non accrevit infra sex annos*. 4th. Set off of a promissory note of plaintiff's, drawn, payable to the order of one John McLeod, for £82 2s. 2½d., and endorsed by McLeod to defendant.

Issue on 1st, 2nd and 3rd pleas. To the 4th the plaintiff replies, 1st, that he did not make the note. 2nd. That McLeod paid it. 3rd. That the said set-off did not accrue within six years. The particulars of plaintiff's demand were for money received on account of plaintiff from the estate of the late Robert Fleming, £89 5s. 6d.

The case was tried at Sandwich, in April last, before the *Chief Justice* of Upper Canada. It was proved that one Robert Fleming formerly kept a shop at Gosfield: he was indebted to several parties, and he put a schooner of his into defendant's hands to be sold, and out of the proceeds to pay these debts: a memorandum was put in, proved to be in defendant's handwriting, as follows:—

“Amount of the claims against the estate of R. Fleming,

		Dividend.
Mr. Park.....	£89 5 6	£51 10 0
Mr. Wigle	45 15 0	25 12 6
Kinslea & Clark	51 11 1	29 10 0
Charles Berczy	29 9 4	17 2 3
	<hr/> £216 0 11	<hr/> £123 14 9”

Mr. Wigle was called as a witness. He proved "*Mr. Park*," meant plaintiff, and said that defendant had paid him (Wigle) \$160 on account of his claim. It was shewn that the schooner was put into defendant's hands in 1833 or 1834, and that he sold her soon after for 200 acres of land in Dereham. It seemed that these four creditors had agreed to take the schooner, and gave Fleming a discharge. On the 25th of February, 1853, the defendant wrote to Mr. Wigle the following letter: "Dear sir,—Having yesterday received a sum of money on account of the lot in Dereham, sold by me on account of Mr. Robert Fleming's estate, I now beg to enclose my cheque for forty pounds on account of your claim, and whatever balance remains in my hands when I receive the balance, shall be remitted." And on the 17th of May, 1855, the defendant wrote to the plaintiff as follows: "Dear sir,—I beg to acknowledge the receipt of your letter of the 11th ult., which, owing to indisposition, has remained unanswered until now. As regards the Dereham property, it is not many months since I received the money due on it; therefore you have not much, if any thing, to complain of. I have no objection to allow it to go on account of what Mr. Kinslea owes me; but if you prefer a law suit, you are perfectly at liberty to commence one as soon as you please. However, it appears to me, that the threat was uncalled for. I expect that Mr. Cameron will visit Amherstburg shortly, when he will be authorised to settle all my affairs for me, which I am very anxious to arrange in consequence of my bad state of health. As regards the complaint you make of my not answering your letter, if such is the case, it was through oversight, certainly not with the intention of neglecting any person that I considered a friend."

Kinslea proved that he owed defendant money for a house and lot, and this money coming from Fleming's estate was turned as a payment, and the defendant gave him a deed; he owed £122 for the house above his claim on Fleming. He mentioned the subject to Mr. William Berczy, and arranged the settlement in 1856 with Mr. Theodore Park, who had been a partner with plaintiff, but was not then. He

stated that the vessel was sold partly for cash, and partly for this lot of land, which sold for £200.

It was objected for defendant that this was a trust, and that the trust fund could only be come at by a suit in equity. The learned Chief Justice overruled the objection, and left to the jury to say whether they were satisfied the defendant had received the price of the land and interest in full, and whether he had enough to pay the several claims stated in his memorandum (which, towards the close of the case, was said to have been made about the time the schooner was taken), with interest in full. They found for the plaintiff, £51 10s., the sum mentioned under the head "dividend," and interest, £77 15s.

In Easter Term, *Alexander Cameron* obtained a rule *nisi* for a new trial on the law and evidence and for misdirection, renewing the objection taken at the trial, and referring to *Mileham v. Eicke*, 3 M & W. 407 ; *Case v. Roberts*, Holt's N. P. C. 500.

In Trinity Term, *A. Richards* shewed cause. (Since the granting the rule *nisi* the defendant died, and this gave rise to some discussion between the counsel as to the argument of the rule.)

For the plaintiff was cited *Roper v. Holland* (3 A & E. 99); and see *Remon v. Hayward* (2 A. & E. 666); and *Allen v. Imlett* (Holt N. P. C. 641); *Pardoe v. Price* (16 M. & W. 451, at page 458); *Bartlett v. Dimond* (14 M. & W. 56.)

Beatty in support of the rule, cited *Mileham v. Eicke*, 3 M. & W. 407.

DRAPER, C. J., delivered the judgment of the court.

I think there is nothing in the point taken as a misdirection. The defendant has stated the account, shewing a specific appropriation of moneys which he admits came into his hands. They may be admitted to have been received in the first instance in trust to pay certain creditors rateably, or in full, if the moneys were enough; but when he has appropriated to each creditor his specific proportion, the trust is at an end. The case was a confused one. It is

difficult to say what the defendant meant by the column headed "dividend." The first column was clearly meant to shew how much Robert Fleming owed each creditor named. The schooner seems to have been sold soon after her transfer to defendant upon this trust, partly for money, the residue paid by the 200 acres of land in Dereham. The defendant's memorandum may have been intended to shew either the proportion of the money to which the plaintiff was entitled, or, which I think more probable, the proportion to which his dividend would amount, taking into account the money paid and the assumed value of the land.

It seems from the evidence that the land must have produced more than was anticipated, but the jury have only given the amount of the "dividend" and interest from the date of the defendant's letter acknowledging the sale of the land. I see nothing against law or evidence in this.

It becomes unimportant to refer to the statement made during the term, that the defendant was dead. In my opinion the rule should be discharged. The plaintiff must take the proper steps to obtain the benefit of his verdict.

Per Cur.—Rule discharged.

KNOX V. CLEVELAND.

Arrest—Evidence.

Upon an action brought for malicious arrest, the jury found for the plaintiff, giving him £75. The court, although not altogether satisfied with the verdict, refused a new trial, there being evidence sufficient to uphold it, and the question being one entirely within their province.

The declaration contained six counts. 1st. Warranty of horses. 2nd. Trover for horse and sleigh. 3rd. Wrongfully depriving plaintiff of use of horse, &c. 4th. Goods bargained and sold. 5th. Malicious arrest. 6th. Malicious arrest.

At the trial, before *Hagarty, J.*, at Woodstock, plaintiff abandoned all but the 1st, 5th & 6th counts.

On the evidence it appeared that one Hislop bought two horses, sleigh, and harness, from the defendant on February 7, 1857, for \$300. Thus notes were given, respectively falling

due in 30 days, 90 days, and six months, signed by Hislop, and by plaintiff and plaintiff's son as sureties for Hislop. The horses were warranted quiet, &c. On trial the purchaser was dissatisfied, and brought the horses back and left them in defendant's stable, as not answering the warranty. Two or three days afterwards Hislop demanded of defendant to give up the notes. Defendant refused, denying warranty, and said even if he had warranted they could not prove it, as neither plaintiff or his son could be witnesses, being on the note. Hislop issued handbills warning persons against the notes. The horses appear to have remained with the defendant, who offered to sell them to a witness, "if plaintiff would not give sufficient security to satisfy him" witness was to give them back. One Pickle finally bought them at a sale of them by defendant, seemingly, but not clearly proved, for their keep.

On objection of defendant's counsel, the judge ruled that the count on the warranty failed, as the bargain was with Hislop.

The case proceeded for the malicious arrests. Hislop appears to have left that part of the country. Plaintiff sued on the first note, and the suit was referred to the county judge. An action was commenced on the second note by some bailable process; but on the 10th of August, plaintiff made affidavit to arrest the defendant in the suit. He was kept in gaol from the 11th to the 18th of August, and then bailed. On the 21st of August an affidavit was made by defendant to arrest him on the third note, which had matured either on the 10th or 11th of August. Defendant was arrested on this last affidavit on the 25th of August.

Plaintiff was proved to be a tenant farmer, having character for honesty and industry, having a lease of a farm for two or three unexpired years; he had a pair of horses, cow or two, waggon, &c.

On the defence a witness proved that he heard a neighbor of plaintiff's say that plaintiff was disposing of his farm and property, and witness told defendant that plaintiff was going to trick him, conveying the impression to defendant (as witness considered), that defendant had better look after

his claim or plaintiff would be off. This was before the arrest. Another witness said he had told defendant that plaintiff had put all his property out of his hands. Defendant's son swore he heard these reports; that Hislop was gone; young Knox was also gone, and defendant had better attend to it. This he told to defendant. Witness presented one of the notes for payment; plaintiff said he could not pay it, and ought not to pay it, and had nothing to pay it with. A suit had then been going on some time. Mr. Ball, solicitor to defendant, proved an ineffectual attempt to settle in his office, between the parties. Defendant told him that he had heard rumours about plaintiff, and asked his advice as to arresting him. He told Mr. Ball the reports rather stronger than what the witnesses stated, but substantially the same, and seemed strongly apprehensive that plaintiff was about to go away. Negotiations were broken off, plaintiff complaining much of having been arrested.

The jury were told to find for the defendant on all the issues except those on the malicious arrest counts. They were told that the latter branch was weak; that the evidence for the defence did not exactly come up to positive information that plaintiff was going away; that if the jury thought the information reasonably raised that idea, and the defendant reasonably believed, and in good faith acted on it, he was justified in so doing; that his affidavit must be assumed to be true till a case was made out against it. The charge was rather in favour of defendant.

A verdict was rendered for plaintiff, and £75, on the 5th and 6th counts; for defendant on all the other issues.

In Easter Term, *Beard*, for defendant, obtained a rule to shew cause why there should not be a new trial on the law and evidence and judge's charge.

Miller shewed cause.

DRAPER, C. J., delivered the judgment of the court.

The verdict for the plaintiff for the arrest in this cause was not improperly influenced by facts, which, under other counts, came under the notice of the jury, viz., the sale of the horses to Hislop; their being returned to defendant on

an alleged breach of warranty; the sale of those horses subsequently by himself, as was suggested for their keep after they were so returned, and his own declaring, while denying any warranty, that none could be proved, because neither plaintiff nor his son could be witnesses. Then there was the apparent vexation of arresting separately on both the 2nd and the 3rd note, having got judgment on the 1st, and commenced an action on the 2nd by non-bailable process. The defendant put before the jury the facts on which he relied to shew reasonable and probable cause, and amongst them, the taking the advice of his attorney before he arrested the plaintiff. The learned judge considered the plaintiff's case by no means a strong one, and told the jury so, and left the case to them with a charge on the whole favourable to the defence. If they had found for the defendant, I certainly should have been disposed to uphold the verdict, and as it is, I have had much doubt in not setting it aside, arising from a desire not to encourage debtors who happen to be arrested, to turn round upon a *bonâ fide* creditor, and by proof of circumstances, not always known to the creditor, but which afford the jury ground for concluding the debtor did not mean to run away, recover a verdict which often goes a long way in satisfying the debt. In this way the law in too many instances becomes a snare for a creditor, who finds it almost impossible to bring clearly before a jury that which induced him honestly to make the affidavit, to which in consequence little attention is paid, if there be on the other side a very moderate amount of contradictory testimony.

We cannot, however, grant a new trial where there was evidence to support it, and properly left to the jury, where the case is one so exclusively for their determination. On the same evidence we may have arrived at a contrary opinion, but this is not enough, and we do not perceive a sufficiently clear ground for granting a new trial.

I think the rule must be discharged.

ARTHUR V. LIER.

Promissory note—Evidence—Release of.

One A. holding a promissory note endorsed by defendant, agreed with the maker that upon payment of an extra amount of interest he would take another note at a longer date; all the extra interest except \$3 was paid. The note being then sent, was refused, on account of the non-payment of the balance of interest, the maker of the note afterwards declined giving the note. Upon an action brought by the holder against the endorsee of the original note,
Held, that he was released.

The declaration was on a promissory note, dated the 21st of April, 1856, made by one Niles, payable to the plaintiff or bearer for £57 10s. with interest, six months after date, and indorsed by defendant.

Pleas, 1st. That there was a special agreement between the plaintiff and Niles, by which the plaintiff agreed to give time to Niles, without the consent of defendant, and that the plaintiff did give time accordingly. 2nd. No presentment to Niles.

The case was tried before *Draper*, C. J., at Picton in April last. The second plea was given up. The only evidence was contained in a commission, read by consent, shewing the examination of one Philip Flayley, who swore that plaintiff told him he had agreed to wait on Nathaniel Niles for payment of the note, by Niles paying him an extra six per cent. interest, and the plaintiff admitted that Niles had paid him the extra interest with the exception of about \$3, which said \$3 Niles left with the witness for the plaintiff, and the witness handed to him. He was told of this agreement in January last, 1858, by plaintiff in his own house. The plaintiff told him that Niles was to give him a new note endorsed by his brother Stephen Philip Niles, and to pay up the back interest, and Nathaniel Niles sent the witness a note for the amount indorsed by his brother, which he presented to plaintiff, who refused to accept it unless the back interest was paid up, and afterwards Niles forbid witness to give plaintiff the note.

The learned judge left to the jury to determine whether the plaintiff tied his own hands from suing the maker of the note when it matured, to the prejudice, or without the consent of defendant, for, if without his consent, it was to his preju-

dice. If they found the plaintiff had so restrained his own power of proceeding against Niles, to find for the defendant.

They gave a verdict for defendant.

In Easter Term, *Fitzgerald* obtained a rule *nisi* for a new trial, on the law and evidence.

In Trinity Term, *Patterson* shewed cause. He cited *Moss v. Hall*, 5 Exch. 48, and *Strong v. Foster*, 17 C. B. 201.

A. Wilson, Q. C., supported the rule.

DRAPER, C. J., delivered the judgment of the court.

It is not suggested that any additional evidence can be given in this case to shew that the jury have drawn a wrong conclusion from the facts which were proved, nor did the plaintiff, on applying for a rule *nisi*, make any affidavit denying that he had given time to the maker of the note, by an agreement, in consideration of receiving a bonus in the shape of increased interest, which was paid for a certain period.

Under these circumstances, unless the jury have acted upon evidence entirely insufficient to warrant their finding, we should not interfere. No complaint is made of the manner in which the case was left to them; nor was it suggested at the trial or now, that there was no evidence for their consideration or determination.

The plaintiff still has his remedy against Niles, whatever that may be worth. He took the note from him payable to himself or bearer, and it does not appear how defendant became the endorser. I think the rule must be discharged.

Per Cur.—Rule discharged.

THE COMMERCIAL BANK OF CANADA V. FLETCHER.

Cognovit—Filing—Common Law Procedure Act, 1857.

Held, that the entering of judgment upon a cognovit actionem, within the periods respectively limited by the 17th and 18th sections of the Common Law Procedure Act, 1857, is a sufficient compliance with the provisions of those sections.

Patterson moved to set aside an order of *Burns*, J., setting aside a judgment entered in this cause on the 30th of March, in favour of plaintiff against the defen-

dant, for £250 damages, and £3 15s. 2d. costs, and all proceedings thereon as against the judgment entered in favour of one John Stevenson Barker against the defendant on the 14th of May last, for \$116 29c. debt, and \$10 72c. costs, so as to give priority to the last-mentioned judgment, on the grounds that neither the cognovit whereon the first-mentioned judgment (was entered), nor any sworn copy thereof was filed of record in the proper office of the court in the county in which the party giving such confession or cognovit resided, nor was any entry of the said cognovit made in the cognovit book as required by the statute. But the judgment is not set aside as against the defendant.

He moved on the order itself, and the affidavits on which it was granted, which were, 1st. That the judgment for plaintiffs was entered upon cognovit at the office of the deputy clerk of the Crown for the County of Oxford on the 30th of March, 1858, and a writ of *fi. fa.* against goods issued on that day from the same office, which was placed in the sheriff's hands on the 3rd of April following, on which the sheriff seized the defendant's goods; that the defendant then and still resides in the village of Ingersoll, in county of Oxford. That neither the original cognovit nor a sworn copy thereof appears ever to have been filed of record in the office of the Deputy Clerk of the Crown, nor is there any entry of the cognovit in the cognovit book. That on the 14th of May, 1858, judgment was entered by default on a specially indorsed writ against the defendant in the office of the Clerk of the County Court, for \$116 29c. debt, and \$10 72c. costs, and on the 19th of May, 1858, a *fi. fa.* against the goods of the defendant was issued, which was placed in the hands of the sheriff of Oxford on the 22nd of May, and had not been returned. It appeared that the original cognovit was filed on the same day the judgment was entered in the office of the Deputy Clerk of the Crown. It bears date the 29th of March, 1858, and it was transmitted to the principal office at Toronto, with the judgment roll.

McGregor shewed cause in the first instance, relying on the Common Law Procedure Act, 1857, sec. 18.

Patterson referred to the English statute, 12 & 13 Vic.

ch. 106, sec. 136 ; 3 Geo. IV., ch. 39, sec. 3 ; Chit. Arch. Practice, 899 ; Bushell v. Boord, 11 Jur. 268 ; Bittleston v. Cooper, 14 M. & W. 399.

DRAPER, C. J., delivered the judgment of the court.

The 17th section of the C. L. P. Act, 1857, is as follows :
“ No confession of judgment or *cognovit actionem* given by any person shall be valid or effectual to support any judgment or writ of execution unless the same, or a sworn copy thereof, shall be filed of record in the proper office of the court in the county in which the person giving such confession of judgment, or *cognovit actionem*, shall reside, within one month after the same is given ; and a book shall be kept in every such office to be called the *cognovit book*, in which shall be entered the names of the plaintiff and defendant in every such confession or *cognovit*, the amount of the true debt or arrangement secured thereby ; the time when judgment may be entered and execution issued thereon, and the day when such confession or *cognovit*, or copy thereof, is filed in the said office ; and such book shall be open to inspection by any person during office hours on the payment of a fee of one shilling.”

In this case the *cognovit* was in fact filed on the day after it was given, in the office of the Deputy Clerk of the Crown for the County of Oxford, being the county within which the defendant resides. The first branch of the section of the statute was literally complied with. The section does not require that, being filed, it should remain in that office, and it was a matter of regular practice to transmit it with the judgment roll to the principal office. The penalty, so to speak, is confined to the omission to observe this provision, for the statute says, no *cognovit* shall be valid to support any judgment or execution, unless it or a sworn copy is filed within a month in the office prescribed. The subsequent provision as to the entry in the book, does not make the validity or efficacy of the *cognovit* depend on the fact of the entry. Such an entry is rather the duty of the officer of the court than of the party. If the statute made the validity of any subsequent proceeding to depend on the

entry in the book, it would make it incumbent on the plaintiff to see to the officer performing his duty ; but it could do no more than effect the validity of that which the statute made dependent on the entry, and here the validity of neither judgment nor cognovit is made dependent on it. The 15th section of the C. L. P. A., 1856, is equally mandatory as to the keeping of a book for minuting and docquetting judgments entered by the deputy clerk, and yet I apprehend if the roll were carried in, costs taxed, and the judgment formally entered on the roll, an execution would not be set aside because the deputy clerk omitted to make a minute and docquet in this book. I do not therefore feel pressed with the objection that this entry was not made.

But I do not wish to rest my judgment on so narrow a ground. The statute gives a month within which, if the cognovit be filed, it will be valid to support a judgment entered at any time after the month, and an execution founded on such judgment. When I say at any time, I mean of course, subject to other rules of practice and provisions of law, which apply to cognovits, a certain time after their execution. Now, during this month, the judgment may be entered, the execution issued, the money made and paid over to the plaintiff in that cause. Yet the argument is, that if the cognovit were not formally filed in the office in the county in which the defendant lives, and an entry thereof be made in the cognovit book, the cognovit will not support the judgment and execution, which, if it means any thing, means that they may be set aside. There is no introductory recital or preamble to these sections, which serves to explain the mischief intended to be remedied, or as a key to unlock the meaning of the legislature. But I adopt entirely the suggestion of my brother Burns, that the intention was to provide against cases where a man in business gave his creditor a confession of judgment by way of security, and the creditor kept that in his desk for months or years, allowing the debtor to contract debts and liabilities to others without any suspicion of the existance of such security, and the confession was suddenly acted upon ; and the language of both the 17th and 18th sections are consistent with the

opinion that the remedy is given against confessions of judgment kept on hand without being properly acted on. The 17th, in relation to confessions given after the act, allows a month, during which the filing and entering may be postponed. The 18th section, in relation to confessions before the act, gives four months. The object of both is, that the secrecy of such incumbrances, and the *quasi* fraud they may operate upon third parties, shall not be suffered or risked for a longer period. But surely it could not be meant, under the 18th section, that where an execution against lands had been near a twelve-month in a sheriff's hands, the lands advertised, and the day of sale all but arrived, that the validity of the judgment, execution, and sale should depend upon the re-filing a cognovit on which judgment had been entered at least a year, and a *fi. fa.* against goods had issued, on which possibly part of the debt had been realized. If the reason of the statute is rightly assumed above, then the object of it will be fully attained, by holding that the 17th section vacates a cognovit, which is not acted upon by entry of judgment, or by filing, &c., within one, and the 18th, within four months, from the times respectively fixed by those sections. It is to be observed, that no period is limited by either sections, after which the objection for the omission to file the cognovit or a copy, and to enter the particulars of it in a book, cannot be taken. It may be urged, as well after the interval of months or even years, as of days or weeks, for any thing the statute says to the contrary, or as well after the debtors' goods have been sold, and the debt due to the creditor, who took the confession, paid off and satisfied, as before. In the present case the goods are under seizure, and might have been, though they were not, sold before the latter creditor comes in. If the act is to be so construed, as to apply to this case, the fact that the goods were sold and the proceeds paid over, should make no difference, for the literal construction adopted in the one instance, should equally prevail in the other. I cannot think the legislature meant that the judgment and execution of a creditor, who received the active acknowledgment by cognovit of his debt, and prosecuted

his remedy on it immediately, should be liable to be not merely postponed, but wholly vacated, in favour of another creditor, who subsequently brought a suit by a specially endorsed writ, and obtained judgment by the tacit acknowledgment of the debtor, who does not appear and defend. It appears to me, the true construction of the act is, that if judgment be entered on the *cognovit actionem*, within the one month limited by the 17th section, or the four months limited by the 18th, the filing the cognovit and the entry of its particulars in the cognovit book, are unnecessary; that the case then does not fall within the spirit and intent of the enactment.

We were referred to the cases of *Billeston v. Cooper* (14 M. & W. 399), and *Bushel v. Boord* (14 Jur. 268). Both these cases were under the English bankrupt acts. The former of these cases is decided on the authority of *Biffin v. Yorke* (5 M. & G. 429), in which it was held that money levied under a cognovit, not filed, and upon which no judgment had been signed within 21 days, was recoverable by the assignees of an insolvent, though the money had been paid over before the insolvency, and the latter case affirms the principle, on which I found my opinion. None of these cases are direct authorities, from the difference in the wording of the enactments, and obvious policy of the English bankrupt and insolvent laws, which our legislature has not followed.

Per Cur.—Rule discharged.

WILLIAMS V. RAPELJE.

Parol sale—Creditor.

Held, that a sale of goods by parol without any actual delivery and change of possession was void as against subsequent creditors.

TRESPASS for taking horses, waggons, &c. Pleas, 1st. Not guilty. 2nd. Not the goods of plaintiff.

At the trial, before *Hagarty, J.*, at Simcoe, one N. Schuyles proved, that he was agent for plaintiff, a lumber dealer, residing in the United States. One Farmer carried on business at a saw-mill in Charlotteville, plaintiff owned

the mill, and Farmer worked "by the piece." Farmer left this country on the 29th of November last; he had once owned all the property seized. In December, 1856, witness, by plaintiff's orders, had all this property turned over to him, for plaintiff, by Farmer, plaintiff having bought and paid for it. Farmer shewed all the property to witness, but witness left it with him, he managing it as usual and telling witness he could take possession whenever he had a mind to. Farmer went on running the mill after this. This continued nearly a year. On the 4th of December, 1857, after Farmer had left the country, witness, as he said, "fearing the sheriff would be at Farmer's, got possession of the property." A Division Court execution had been then issued, and the bailiff had seized. After a contest in the Division Court, adverse to plaintiff, witness paid the execution and got possession of the property then at the mill, and put one Exford in possession.

The defendant, as sheriff, on the 7th of December, 1857, received a *fi. fa.*, on which he seized this property, on the 19th of January, in the suit of Boyd v. Farmer; judgment was proved to have gone by default, and the Division Court claims were also existing against Farmer. The sheriff's officer who seized, swore that Exford had gone away two weeks before, and the men he found using the cattle at the saw-mill; he had been put there by a division court bailiff.

Mr. Freeman, for defendant, contended that the sale, if any, took place in 1856, and no change of possession till 1857, and therefore the sale was void, as against creditors. The judge considered the objection good, and ought to prevail.

M. Cameron, for plaintiff, contended that there was a change of possession in December, 1856, Farmer holding as plaintiff's servant. The judge did not consider that the evidence supported that view, and so told the jury.

In addressing the jury, plaintiff's counsel insisted that there was was a change of possession in December, 1856.

The judge told the jury that he could see no evidence of any such change of possession, as the law contemplates, till 1857. The words of the statute were given to them and

explained. The jury were asked to say, supposing the transaction to have taken place on the 4th of December, 1857, when Schules took actual possession (as was alleged), was it a sale for good consideration, actually made and in good faith, and was there an immediate delivery and actual and continued change of possession, &c., or was it a pretended sale, on secret trust, &c. The court remarked, that it would render the statute of little avail if verbal bargains could be made of loose property, to be left in vendor's hands, with leave to vendee to take it when he pleased; if he could leave it one, two, or three years, and then take possession on the day before a *fi. fa.* would issue.

No question was made but that plaintiff, in December, 1856, had actually paid Farmer the value of this property.

The jury found for defendant.

In Easter Term, *McMichael*, for plaintiff, obtained a rule *nisi* for a new trial on the law and evidence, and for a misdirection.

In Trinity Term, *Read* shewed cause, and *McMichael* supported the rule.—9 U. C. Q. B. 679; *Frazer v. Lazier*.

DRAPER, C. J., delivered the judgment of the court.

It cannot be successfully contended, that the property in question passed, as against a creditor, by what took place in December, 1856. If there had been a formal conveyance under seal, which had not been filed under the statute, the transaction would, as against a creditor, have been void for want of a continued change of possession. It certainly would be a strange conclusion if we were to hold that a sale by parol, when the vendor remained in possession, using the property as before, could be more effectual than if made by a regularly drawn instrument under seal.

The plaintiff seems to have been sensible of the weakness of his title, and the goods having been seized on an execution from the division court, against Farmer, by his agent paid it, and as the agent swears, he then took possession; an assertion on which, however, doubt is cast by the evidence of the defendant's officer, who made the levy, which is complained of as a trespass in this action, for he swore he found

another person in possession, who said he had been put there by the division court bailiff.

I think the learned judge put the case as favourably for the plaintiff as the evidence would admit of, when he asked them to assume the sale to have taken place on the 4th of December, 1857, the day on which the plaintiff's agent alleged he took possession, and then to determine whether it was a sale for good consideration actually made, and in good faith, and whether there was then an actual delivery and a continued change of possession, or whether it was a pretended sale, on a secret trust for the alleged vendor.

The plaintiff cannot complain of misdirection in this. The evidence given at the trial was, in my opinion, sufficient to sustain the finding of the jury, for the agent's conduct shewed more anxiety to save the property from execution against Farmer, than to guard and look after it as the plaintiff's property. It is a suspicious case, when property is bought and paid for, and left in the possession of the vendor to use and apparently make a profit of, on the vendor's declaration, that the vendee can come when he will and take possession of it. It is not shewn or suggested, that on a second trial the plaintiff can make a stronger case. His agent, who transacted the business for him, gave his account of the matter, and no one else appears to be able to add any new information thereto. I think, therefore, the rule should be discharged.

Per Cur.—Rule discharged.

MARSHALL V. PLATT.

Lottery—Statute 12 Geo. II., ch. 28.

Held, that a sale of land by lot in which there were two prizes, came within the imperial statute, 12 Geo. II., ch. 28, and that statute is held to be in force in this country, under the authority of the co-ordinate jurisdiction of the Queen's Bench, in *Cronyn v. Widder*.

Cognovit to pay £45 with interest in four instalments. The declaration claimed the first and second instalments, with interest.

The case was tried in April last, at Simcoe, before *Hagarty, J.* It was proved that the plaintiff laid out a portion of his land in village lots, of one-sixth of an acre each, in the village of Romelia, and issued handbills stating that twenty-five valuable lots were to be disposed of, by way of lottery. The price of tickets was twenty dollars each. And the lots were numbered from No. 1, upwards. Each ticket was also numbered, and tickets corresponding thereto, were placed in a hat, and drawn from thence one by one, and the holder of the number, first drawn from the hat, was entitled to lot numbered one, the holder of the number next drawn, to lot numbered two, and so on. The parties who got lots one and two, paid no more for their tickets. The holders of all the other tickets had to give security to pay £45 in four instalments, with interest. The defendant at this drawing of tickets, got No. 16, and executed the instrument sued upon.

The learned judge left it to the jury to say, as a matter of fact, whether the plea was proved, telling the jury, that parties might shew the real features of a transaction, which in its nature, was illegal.

It was agreed that if the verdict was found for the plaintiff it should be £33 6s., and if for defendant, plaintiff should have leave to move to enter a verdict in case the evidence shewed no defence; on the ground of the illegality of the transaction. And if the verdict was rendered for plaintiff then defendant to have leave to move to enter a verdict for himself.

The jury found for defendant.

In Easter Term, *M. C. Cameron* obtained a rule *nisi* to enter a verdict for plaintiff, on the leave reserved.

In Trinity Term, *R. Martin* shewed cause. He contended that the case came clearly within the statute 12 Geo. II., ch. 28, and referred to a decision given in the Court of Queen's Bench last term, in a case of *Cronyn v. Widder*, in which it was held that this statute was in force in Upper Canada.

Cameron supported his rule. The Provincial statute 19 Vic., ch. 49, was passed after this transaction, which is con-

sequently not affected by its provisions. The preamble recites that it is desirable that the practice of selling lands, goods and chattels by lot or chance should be prohibited by law, and any such sales declared void. Now if the statute, 12 Geo. II., had already been in force, such a recital would scarce have been made, for such proceedings were prohibited by law, and sales so made were void under the English act. He also referred to Wallbridge v. Becket (13 U. C. Q. B. 395), which, however, does not touch the point in question. O'Connor v. Bradshaw, 20 L. J. Exch. 26, reported also in 5 Exch. 882; Reg. v. Whitmarsh, 19 L. J. Q. B. 469, reported also in 15 Q. B. 600.

DRAPER, C. J., delivered the judgment of the court.

It appears to us clear, beyond denial, that this case comes within the provisions of the English statute, 12 Geo. II., ch 28. And as the Court of Queen's Bench have recently decided that statute to have been in force in Upper Canada, if not so, since the passing of the 19 Vic., ch. 49, we think we ought to follow the decision of a court of co-ordinate jurisdiction in so holding the law, until overruled by higher authority. The question suggested itself in Molson's Bank v. Bates (6 C. P. U. C.), though it was not raised in argument, and was not necessary, in that case, to be determined. I should not feel at all prevented from holding that the statute 12 Geo. II. was in force in Upper Canada, under the first act of the legislature of this Province introducing the law of England, by the language of the preamble to the late act, which was enacting a statute for the whole province of Canada.

I think the rule should be discharged.

CLARK V. THE GREAT WESTERN RAILWAY CO.

Factor—Lien.

Held, that a factor has no lien on goods consigned to him, until they actually come into his possession.

This was an action to recover from the defendants, ^{as} _{as}

common carriers, the value of eighty-five barrels of flour, alleged to have been received by the defendants, to be carried by them, and delivered for the plaintiffs from the Dundas Station of the defendant's, and to be delivered to the New York Central Railway Company, at the Suspension Bridge Station, by them to be forwarded to the plaintiffs, at Albany, in the state of New York, for reward in that behalf.

The plaintiff's declaration after setting forth the said alleged contract, charged the said defendants with a breach thereof, in not delivering the said flour to the New York Central Railway Company, at the Suspension Bridge station, to be forwarded to the said plaintiffs at Albany aforesaid, or elsewhere, and the consequent loss, &c., to the plaintiffs.

The defendants pleaded thereto.

1st. That they were not guilty.

2nd. That the plaintiffs did not deliver to the defendants, nor did the defendants receive the said goods, to be carried and forwarded as alleged.

3rd. That the said goods were not the property of the plaintiffs. Upon which issues were joined.

The case was tried before *McLean*, J., at the last spring assizes, in and for the County of Wentworth, when a verdict was found for the plaintiffs, for £132 16s. 3d. subject to the opinion of the court upon the following case, as it appears from the facts proved, and the evidence elicited at the said trial.

CASE.

The defendants, by their freight agent, A. Middlemiss, on the 29th day of January, 1857, received from James Crawford, manufacturer of flour at Dundas, the 85 barrels of flour in question, and signed and delivered a receipt therefor, produced by the plaintiffs at such trial, which was as follows :

“ Dundas, 29th January.

No. 62.

“The Great Western Railway have received from James Crawford, the undermentioned articles, in good order and

condition, to be delivered in like order and condition, subject to the prescribed tariff, duties, and regulations of the Company, to the New York Central Railway Company, at the Suspension Bridge station, to be forwarded to Messrs. Clark and Gifford, Albany.

NO. OF PACKAGE AND DESCRIPTION.	MARK.	WEIGHT.
" 85. Eighty-five bbls. Flour.	Y	

"Signed for the G. W. R. Company.

"(Signed) A. MIDDLEMISS."

The receipt was in the ordinary form used by the defendants was filled up by the said James Crawford, and was signed by the said agent of defendants.

That concurrently therewith, one William Wilson, the servant or agent of the said James Crawford, signed and delivered to the agent of the defendants, the following declaration :

Dundas, Canada West, January 29th, 1857.

" I, William Wilson, do hereby solemnly, sincerely, and truly affirm that the invoice subjoined contains a just and true account of the property delivered by me to the Great Western Railway Company this day consigned to Messrs. Smyth, Megs and Young, of Albany, and that the actual costs and value thereof is as therein stated, say five hundred and ten dollars.

"(Signed)

"WM. WILSON."

Invoice referred to in the above.

ENUMERATION OF PROPERTY.	Y.	ACTUAL COST OR VALUE.
85 bbls. Flour.	\$6	\$510

That on or about the 11th day of February, 1857, the said eighty five barrels of flour were delivered by the defendants to the New York Central Railway Company, at the

It appears as set forth in the receipt, that the said flour was delivered by the said defendants to the New York Central Railway Company at the Suspension Bridge station, to be forwarded to the said Smith, Megs, & Young, instead of the plaintiffs.

That the plaintiffs never received the said flour. That the receipt referred to in the following letter, was forwarded to the said plaintiffs in a letter to them of the same date, a copy of which letter is as follows :

“ Dundas, 29th January, 1857.

“ MESSRS. CLARK & GIFFARD,
Albany.

“ DEAR SIRs,—We are in receipt of your letter of the 24th instant, and the contents appear to be alike surprising and unsatisfactory, the non-acceptance of this last draft, with property in your hands against it, appears certainly extraordinary. We enclose to-day receipt for 85 bbls. Y. flour, which, so far as our statement of account stands, covers all the drafts made to this date; the 120 bbls, Oxford Mills flour, so long detained, passed the Suspension Bridge on the 26th inst., this, together with the \$1000 over-charged in your letter of the 19th inst., will fully cover our account. We have experienced considerable annoyance from our bankers, and have been obliged to give them a statement of the matters. It certainly appears you have used us very harshly.

“ Yours respectfully.

“(Signed) “JAMES CRAWFORD.”

That Middlemas swore that Crawford stated it was of no moment whether the flour was sent to either the plaintiffs or to Smith, Megs, & Young. That the said James Crawford was in the habit from time to time of shipping flour from the said Dundas station of the said defendants to the said plaintiffs at Albany, and also to the said firm of Smith, Megs, & Young. That the said Crawford was also in the habit of drawing upon the said plaintiffs and of making consignments of flour to secure them for any advances they might come under for the said Crawford, without reference to any particular consignment. That flour so consigned was sold by the said plaintiffs in their own name, and the proceeds applied to the credit of the said Crawford, less the usual commission of $2\frac{1}{2}$ per cent., payable to the said plaintiffs, and of which

they were required to make returns to Crawford. That the plaintiff's clerk said that at the time of the said shipment of the said 85 barrels of flour the said Crawford was indebted to the said plaintiffs in respect of such advance in an amount greater than the value of the said flour, and that such indebtedness hath continued to the present time, and it further appeared that the said Crawford is insolvent and has absconded from the province. That the following letters were also put in and read as evidence at the said trial :

“ *Great Western Railway Managing Director's Office,*
“ Hamilton, Canada West, 26th May, 1857.

“ MESSRS. CLARK & GIFFORD,
Albany.

“ DEAR SIRs,—I must apologise for not replying earlier to your favours of the 7th and 18th inst. The inclosed letter was handed to the writer of this to be posted, but he misunderstood the matter, and believed it to be only a copy, hence the delay, as we were waiting your reply to Mr. Crawford.

“ I may mention, that although the 85 barrels in question were intended for you, Mr. Crawford's clerk entered the names of Messrs. Smyth, Megs, & Young, and thereby caused the error upon our part. I trust this matter may be arranged between yourselves and Mr. Crawford.

“ I am, dear Sir, your obedient servant,

“ C. J. BRIDGES,

“ Managing director, per J. Bell.”

(Enclosure.)

“ *Dundas, 3rd July, C. W., 1857.*

“ MR. BELL,

“ *Grt. W. R. W. Co.'s Office,*
Hamilton, C. W.

“ DEAR SIR,—I was rather astonished to hear that Mr. Clark, of the firm of Clark & Gifford, (Albany), had been demanding settlement from you for the cost of 85 barrels of flour which ought to have been sent to his address last winter, but which, through some misunderstanding with the freight agent here, were sent elsewhere. It appears to me as though Mr. Clark made you imagine that he had been a *bonâ fide* purchaser of this flour, and had paid me for it at a specified rate for each barrel. Instead of this C. & G. sold all the flour sent them by me on commission,

and consequently this was only one of many consignments with which they are debited in account current.

"They have still to send me account sales for nearly 1000 barrels flour, and as it is impossible for me to know how their account actually stands until they do so, it is equally impossible for me to arrive at a settlement so soon as such account sales, and accounts are rendered me. I am quite willing to settle with Messrs. C. & G. for whatever balance may be due them. I am exceedingly astonished that they should have troubled Mr. Bridges and yourself in this matter as they have done.

"I hope that this will explain the matter to your satisfaction.

"I am, dear Sir, yours respectfully,

"JAMES CRAWFORD,

"per Wm. Sheat."

"P.S.—I have written to C. & G. several times for the account sales above-mentioned.

(Signed)

J. C.

The case was argued by *Hector Cameron* for plaintiffs, referring to *Midland G. W. R. Co. v. Benson*, 30 Law Times 26; *Conn v. Bristol and Ex. R. Co.*, 30 L. J. 324; *Story on Agency*, 111.

Irving, for defendants, cited *Dunlop v. Lambert*, 6 C. & F. 600; *Sargent v. Morris*, 3 B. & Al. 277.

DRAPER, C. J., delivered the judgment of the court.

It was conceded by the plaintiff's counsel, at the threshold of his argument, that the plaintiffs were factors of Crawford, by whom the wheat was put into the hands of the defendants to be forwarded; that they, as such factors, had made advances from time to time for Crawford, and that at the time he delivered this flour to the defendants, he was indebted to the plaintiffs in respect of those advances, but that they had made no advances on account of this particular flour.

He claimed either that the property in the flour was changed by the delivery to the defendants, coupled their receipt, in which they undertake for its delivery to the New York Central Railway Company at the Suspension Bridge, to be forwarded to the plaintiffs, and the transmission of that receipt to the plaintiffs by Crawford, or that at all events these facts gave them a general lien on the flour, and that on one ground or the other he was entitled to recover;

maintaining that the adoption by Crawford of the delivery of the goods to Smith, Megs, & Young would afford a conclusive answer to either action. But if so, I do not see how an action can be maintained against the defendants. Factors are, except as between themselves and their principal, to be treated for most purposes as owners of goods consigned to them. In this case they never obtained actual possession, and until that was the case, no right of lien attached, which could prevent Crawford from making any disposition of the flour which he pleased. It is not a right of stoppage in transitu which he possessed, for that presupposes a sale, an act by which the goods consigned are to be the absolute property of the consignee. But as between factor and his principle, even after the former has obtained the possession, the goods are the property of the latter, and he has a right to direct and control the sale of them subject to the factor's lien, and before the factor obtains possession he has, although under advances for the very goods, and although they have been forwarded and have arrived at the very port where the factor is to receive them, no right as against the principle, nor that I can perceive against the carrier, in whose possession they are. For, while, as regards the principal, the possession would confer no right of property, as against third parties, I feel no doubt possession would be necessary to clothe them with the right to be treated as owners of the goods.

In the present case, it might further be urged, that the evidence shewed on the part of Crawford, a clear adoption of the delivery to Smith, Megs, and Young, of Albany—a consent *ex post facto* it is true, but one which he had an undoubted right to give, and which would in itself be an answer to the plaintiff's claim, for his right over the goods until they actually got into the plaintiff's hands was clearly paramount. If the property in the goods has vested in the plaintiffs, which is what is contended on their behalf, then they could maintain trover for them in the hands of Smith, Megs, and Young, or if they had sold them, an action for money had and received would lie in their behalf for the proceeds. It is obvious neither of these actions would lie.

It appears to me the *postea* should be delivered to the defendants, on the short ground that the plaintiffs were merely factors of Crawford; that the goods never came into their hands; that other parties have received and disposed of them with Crawford's subsequent assent, and that the plaintiffs therefore fail to shew any property in, or right to, the goods.

Mr. Cameron relied very much on the case of *The Midland Great Western Railway Company v. Benson*, reported in the 30 L. T. 26, and decided by the Court of Common Pleas, in Ireland. It does not appear to me to touch the present case, which much more resembles the case of *Kenlock v. Craig*, which was carried to the House of Lords, (3 T. R. 783), and there it was laid down that the factors could have no property in the goods which had not come into their actual possession.

The case which most resembles the present is that of *Bryour v. Nix* (4 M. & W. 705). There the court held, that if the intention of the parties to pass the property, whether absolute or special in certain ascertained chattels, is established, and they are placed in the hands of a repository, on account of the person who is to have that property, and the repository assents, it is enough to vest the right of property in such person; and they held, that where oats had been put on board a canal boat at L., and the master gave a receipt for these oats, stated them to be shipped, deliverable to the shipper's agent in D., in care for, &c., to be shipped to the plaintiffs at Liverpool, and the shipper enclosed this receipt to the plaintiffs, and drew a bill on them against the value of the oats, which the plaintiffs accepted and paid; that this gave the plaintiffs an absolute right to the oats, just the same as if the shipper had deposited them with a stakeholder who assented to hold them for the plaintiffs in order to indemnify them. And that the instrument signed by the master was decisive to shew that the plaintiffs were to take immediately in their own right, and were not mere consignees of the shipper, who were to have their lien when the goods arrived as factors of the shipper, in which character it appeared there had been previous dealings between them.

The distinction between that case and the present is very obvious. There was no proof of any intention in this case, that the property in these 85 barrels of flour should vest in the plaintiffs. It was a consignment not differing in any way from those which had preceded it in the dealings between Crawford and the plaintiffs, in which they were confessedly Crawford's factors, and there was no acceptance given or advance made or liability incurred by the plaintiffs on account of these 85 barrels of flour. I consider that this flour was placed in the defendant's hands by Crawford at his own risk, and for his own benefit; that there was no contract such as is set forth in the declaration proved as between the plaintiffs and the defendants, and that on all the facts shewn, the consignor, Crawford, was the only person who could maintain an action against the defendants for damage to, or for the loss of the goods. The different decisions bearing on the subject down to that time are referred to in this case.

Kenlock v. Craily, 3 T. R. 783-7; Hammond v. Barclay, 2 East. 227; Lickbarrow v. Mason, 2 T. R. 63; Drinkwater v. Goodwin, Cowp. 251; Brown v. Hodgson, 4 Taunt. 189; Lewis v. Campbell, 8 C. B. 541; Sergeant v. Morris, 3 B. & A. 277; Dunlop v. Lambert, 6 Cl. & Fin. 600; Brown v. Hare, 31 L. T. Exch. 354.

SUTOR V. McLEAN.

Nonsuit.

Held, that when a nonsuit is granted at the trial, leave cannot be reserved to move to enter a verdict without the defendant's consent.

Samuel Suter, by John R. Martin, his attorney, complains of the Honourable Archibald McLean, who has been summoned by virtue of a writ issued on the twenty-first day of October, in the year of our Lord, one thousand, eight hundred and fifty-seven. For that, whereas one Alexander Russell, before and at the time of the making of the promise

by the defendant hereinafter next mentioned, was indebted to the plaintiff in a certain sum of money, to wit, the sum of thirty-five pounds, and thereupon theretofore, to wit, on the fourteenth day of March, in the year of our Lord one thousand eight hundred and fifty-six, in consideration of the premises, and that the plaintiff, at the request of the defendant, would discharge the said Alexander Russell from the payment of the said sum of money, he the defendant promised the plaintiff to pay him the said sum of thirty-five pounds within a reasonable time, and the plaintiff avers that he, confiding in the said promise of the defendant, did discharge the said Alexander Russell from the payment of the said sum of money, of all which the defendant had due notice. Yet, the defendant, although a reasonable time hath elapsed since the making of the said agreement, hath not paid the plaintiff the said sum of thirty-five pounds, or any part thereof, although often requested by the plaintiff so to do.

The defendant pleaded to the first count of the declaration that he did not promise as alleged, and for a second plea as to the residue of the said declaration, the defendant says that he never was indebted as alleged.

Upon which the plaintiff joined issue.

Upon the trial, at the sittings of the County Court, held on Tuesday, the ninth day of March, in the year of our Lord one thousand eight hundred and fifty-eight, evidence was submitted by the plaintiff as follows: letter of defendant, of the fourteenth of March, one thousand eight hundred and fifty-six, put in as the basis of this action. Also letter of Mr. Martin of July the eleventh, one thousand eight hundred and fifty-seven, and the answer of the defendant of the fifteenth of July of the same year, which letters are hereto annexed.

From the judge's notes, the evidence was as follows:

Francis Stevenson.—States that Samuel Sutor, plaintiff, owes him certain costs; I do not know how much, and I do not know without reference to my books what amount paid: I think about three pounds and fifteen shillings on account of services relative to the McLean lot; three pounds

were for costs on account of note in Sutor's favour signed by Charles McLean.

Cross-examined.—Three dollars were paid, I think, after date of the letter put in. Reflecting, says, I think the three pounds were not paid.

Thomas Mills.—The bill of costs, five pounds five shillings and six pence, in the suit of Alexander Russell, Samuel Sutor and Charles McLean, annexed and marked, was paid to T. H. Ackman, Attorney.

Cross-examined.—The bill was settled by contra account, and is correct so far as I know.

Charles McLean.—The letter first put in I took to the defendant, and had a conversation with him. Stated that Russell was indebted to the plaintiff. Russell was discharged, I was also. Plaintiff indorsed my note in Russell's favour, and this note was settled by an allowance of plaintiff's claim against it, and Sutor has never looked to me for payment. His father has possession of the place, and judge *McLean*, I understood, is the owner of it.

Cross-examined.—States, I do not know that defendant is the owner of the place. Letter of the 14th March, was written for my benefit. Defendant owed me nothing, and he holds the land for moneys advanced upon it, otherwise I am entitled, subject to the defendant's claim for thirty pounds. Plaintiff endorsed my note for my debt to Russell. Two notes were given by me payable to Russell, one for three hundred dollars, and one for sixty dollars, on account of purchase of the premises. Plaintiff endorsed these notes, paid something on these notes, about seventy dollars, not endorsed. Russell sued me and plaintiff, and plaintiff set off his accounts against Russell for one hundred and forty dollars. Plaintiff giving up his account against Russell, which went in payment of the notes. A judgment was recovered on them.

Upon which evidence, *G. G. McLean*, counsel for defendant, moved for nonsuit on the following grounds :

That the plaintiff, by the application of the thirty-five pounds, discharged his own liability only on the notes to Russel endorsed by him. That the letter put in as the basis

of this action discloses no undertaking of defendant beyond his promise to accept a bill for thirty pounds. That the action, if sustained at all, should be for money paid for Charles McLean at defendant's request. Also, that any promise in the letter is without consideration.

It was not denied by the pleadings that the plaintiff discharged Russell as alleged, but plaintiff was nonsuited upon the grounds that the letter of the fourteenth day of March, one thousand eight hundred and fifty-eight, relied on as the basis of this action, does not disclose an undertaking or liability of the defendant to pay the sum sought to be recovered in this cause, reserving leave to plaintiff to move to set aside nonsuit, or to move to set aside nonsuit and enter verdict for thirty-five pounds.

The counsel submitted that the assent of defendant was necessary to the leave as reserved, and that such assent was not given. The objection on this point was overruled, it being open to defendant to take same objection in answer to the motion to enter verdict if made.

In term of the County Court, holden on the fifth day of April, in the year of our Lord one thousand eight hundred and fifty-eight, the plaintiff moved, pursuant to leave reserved, to set aside the nonsuit, and enter a verdict as expressed in the certified copy of the motion, and the rule *nisi* hereto annexed, which rule being granted and left open for argument during the term, the same was on the tenth day of the same month enlarged until the first day of next term.

In which term, on the fifth day of July, in the year of our Lord, one thousand eight hundred and fifty-eight, *Martin*, for plaintiff, moved the rule *nisi* absolute, to set aside nonsuit, and enter a verdict for plaintiff, the rule being open for cause to be shewn during term, and no cause being shewn, *Martin*, on the tenth day of the same month, applied for judgment on his motion to set aside nonsuit, and enter verdict for plaintiff for thirty-five pounds; judgment was thereupon given that the rule *nisi* to set aside the nonsuit and enter a verdict for plaintiff be made absolute, the same being duly served, and no cause having been shewn to the contrary.

The letter on which the plaintiff's case rests is as follows, addressed to him by the defendant:

"Toronto, March 14th, 1856.

"DEAR SIR,—On examining into the state of matters, with the bearer, Charles McLean, I have made up my mind to assume the several obligations due on the south-east quarter of lot number fourteen, first concession North Talbot Road, in the township of Cayuga, and as the amount is somewhat more than I supposed when I first was asked to assist in the matter, I must ask some little indulgence from the parties interested. I have taken an assignment of the interest of the bearer in the premises, and hope soon to be able to take measures to relieve the premises of all claim, so that the patent may be obtained in my own name, but it is possible that I may not be able to do so till after the month of June, on my return from the circuit. As to that part in which you are immediately interested, I am told by the bearer, that you have a claim of \$140 against Russell, which he is willing to allow on his demand, and that, deducting what has been paid, there will be a balance of about £25, exclusive of costs. For that balance (I suppose it will not exceed £30), I have no objection to your drawing upon me at any time through any of the banks, but you may as well draw at three months, so that the payment will fall due in the latter part of June, by which time, and I hope before, I shall be quite prepared for it, and I hope for a much larger amount. As to your \$140, you must let that rest for some little time, but if all goes right you will lose nothing by that. When Russell is paid off he must give up possession to the bearer. Indeed, I do not see that he has had any right to retain possession so long, but as long as he was without his money, he had some claim for indulgence. He ought to deduct the value of the timber taken from the amount due to him, and if he does consent to do so, the value or the amount for which he sold it, could be recovered from him by a suit in the Division Court as so much money had and received to the use of Charles McLean. I shall be obliged by your speaking to W. Stevenson, and saying to him that should I be disappointed in receiving the amount to defray what is coming to him in the mean time, I shall be prepared to accept his draft for the whole amount in June, payable at sixty or ninety days after date, of course paying any discount on his draft. I hope this will suit him, and as the amount will be payable with interest from the time it became due, he cannot lose any thing by the transaction. When I accept his draft or pay the amount, of course I shall expect

an assignment of all his interest in the premises, so that, on paying what is due to the Indian department, I may get the patent in my own name.

“(Signed),
“A. McLEAN.”

This letter was handed by the defendant, and by him given to Charles McLean.

GROUND OF APPEAL.

That the judge of the County Court could not, without the defendant's consent, order a verdict to be entered for the plaintiff.

That the nonsuit granted at the trial was properly granted, and was right in law, and should not have been set aside.

In Trinity Term, *A. G. McLean*, for defendant, renewed the objections taken before the judge of the County Court.

Martin argued the case for the plaintiff.

DRAPER, C. J., delivered the judgment of the court.

We are all of opinion that the appeal must be allowed. The learned judge has made the rule absolute to enter a verdict for the plaintiff on the leave reserved at the trial, because the defendant's counsel did not appear to shew cause against the rule, considering that it was within his discretion so to do. We are met with the difficulty that the leave was reserved without the consent of the defendant's counsel, and contrary to his expressed desire, after the nonsuit had been granted. We think it well settled that consent must be given to reserve leave to move to enter a verdict. It is to some extent giving to the judge the functions of a jury, which our law does not enable him *suâ sponte* to assume.

The parties have, however, desired the expression of an opinion on the merits. So far as I have formed one, I am willing to state it.

To understand it clearly, we must look at the surrounding circumstances as they appeared in the evidence at the trial, from which evidence I gather that Charles McLean had purchased one Russell's interest in the premises, (fifty acres of land in Cayuga) and had given him two promissory notes,

endorsed by the plaintiff in payment. One was for \$300, the other for \$60. It would seem that Mr. Stevenson, mentioned in the foregoing letter, had also some interest in the premises which the defendant meant to purchase; and there was also some money due to the Indian department, which being paid, the patent from the Crown would issue for the quarter lot. Charles McLean was unable to pay these notes to Russell, who still retained the possession. Some thing had been paid on them, perhaps \$100, and he applied to the defendant to assist him. Russell had, as I gather, brought an action against the plaintiff and Charles McLean for the balance on the notes, on which judgment had been recovered. The defendant undertakes to help Charles McLean, and to secure himself, he takes an assignment from him of his interest, and expresses his intention to pay Mr. Stevenson, and get an assignment from him, so that by paying the Indian department, he could get the grant for the land in his own name. In this state of things the letter is written. In reference to Russell's claim, the defendant speaks of it in writing to the plaintiff: "As to that part in which you are immediately interested." Part of what? The preceding sentence of the letter affords the answer. He says he hopes soon to be able to relieve the premises of all "claim." Russell's claim, for which he had sued plaintiff and Charles McLean, was one, and Russell (right or wrong) held possession until he was paid. The defendant says then, in reference to this, "I am told by the bearer you have a claim of \$140 against Russell, which he is willing to allow against his demand." He then, assuming the plaintiff will make this set-off, estimates the balance and costs at \$120, and he authorises the plaintiff to draw on him, and adds, "As to your \$140, you must let that rest for some little time, but if all goes right, you will lose nothing by that."

Now, I do not understand that the plaintiff had any security on these fifty acres. The defendant had got an assignment from Charles McLean of his interest, it being the evident intention that these notes due to Russell should be paid. The £30 to be raised on defendant's acceptance was to go into plaintiff's hands in order that he might

take up these notes, paying \$140 to Russell of his own funds, by discharging Russell from that amount which he owed plaintiff.

With these facts before us, we are asked to say whether the letter of the defendants contains evidence of a request to the plaintiff to pay these \$140 to Russell, and whether it was a request, the fulfilment of which was for the advantage of the defendant. If these questions are answered affirmatively, then the plaintiff, having paid Russell by allowing these \$140 in the manner proposed, has, I think, a right to recover them back in this action.

It seems to have been the defendant's wish to assist and relieve Charles McLean. For this purpose he expresses his intention, "to assume the several obligations due" on the lot. The notes to Russell were certainly part of these obligations, and are expressly referred to. The £30 drawn for was the balance with costs on these notes, provided the plaintiff assisted by allowing the \$140, due by Russell to him, to go in part payment. It is said he was relieving himself in doing this. That is true, but *non constat*, that if execution had issued, Charles McLean's property might have satisfied part of the amount, and if not, it is plain that as the plaintiff was only a party to the notes for Charles McLean's accommodation, that the moment the plaintiff paid any part of it, he would have right to re-imbursement from Charles McLean. To relieve this latter, therefore, by assuming all the obligations due on the land, it was as necessary to pay the \$140 as the other portion remaining unpaid. And the defendant, in his subsequent letter, in reply to one from the plaintiff's attorney asking for payment, says to the effect that it was his intention to have paid this as well as the £30, and Mr. Stevenson's claim, and the money to the Indian department, with the view, as the first letter states, of getting the patent in his own name. That Charles McLean and plaintiff so understood, appears from the former testimony, when he states the plaintiff discharged Russell and him (C. McL.) also. As at present advised, I think this does afford proof of defendant's request to plaintiff to pay the money, and that some benefit arose to defen-

dant and some disadvantage to plaintiff in giving up his claim against Russell. This is, however, my own view only.

We all think the judgment below must be reversed, and a new trial ordered without costs.

THE QUEEN V. BREWSTER AND COOK.

Nuisance—Agent.

Held, that a party cannot justify as agent of another for maintaining a public nuisance.

2ndly. That twenty years' user will legitimate an easement affecting private property, but not a nuisance; and

3rdly. That persons having come to live within the scope of a nuisance after the same had been created, did not prevent their complaining of it as a public nuisance.

INDICTMENT for unlawfully erecting, placing, and maintaining in, upon, and across the River Aux Sables, at the township of Bosanquet, near to a part of the river intersected by the Queen's common highway, called the lake road, a dam eight feet high, and over one hundred feet wide, whereby the highway is overflowed with water, and obstructed, and another common public highway running along the westerly bank of the river near the said dam, is also overflowed and obstructed. And by reason of the premises the waters of the river are dammed back and rendered sluggish and stagnant above the dam, and noxious and unhealthy vapours arise therefrom injurious to health in the said township, to the great damage and common nuisance of Her Majesty's subjects, to the evil example, &c.

At the trial at Goderich, in May, 1855, before *Sir J. B. Robinson*, Chief Justice, the following evidence was given:

Robert Rae—Was one of the councillors for Bosanquet: Brewster's mill in this township is now occupied by defendant: he has been there two or three years; from 1st July, 1856: the dam was there then. It is eight feet high, he thought: defendant is there working the mill as Brewster's agent: this prosecution originated with the township council: a notice was sent to Cook: the dam has been continued from 1st July, 1856, and is still: the lake road is covered for some

distance by the water of the pond. The dam is forty-eight paces long: there is a road allowance of half a chain on the bank of the river, as witness understands: that road, if there is one, is flooded, so as to render it useless: thinks that not less than 1000 or 1500 acres are flooded by the dam: the country around was unhealthy in 1856. Almost every family ill with fever and ague: from 1851 to this time there is scarcely a family within four or five miles of the dam but has had fever and ague: not so in other parts of the township; a vast forest of trees is dead, killed by the water: has no doubt that the dam is the cause of the sickness: the stream is dammed up for miles. Brewster is out of the province: witness came there in 1851: the dam was up when witness came: believes it has been up for more than twenty years. Thinks the water is five and a half feet higher above the dam than below.

John Elliott—Produced a map of Bosanquet: points out the land flooded: thinks fifteen or twenty thousand acres are flooded: trees all dead, and a good deal decayed, and in summer the water gets lower and the stench is most offensive: thinks it has effect for four or five miles in producing ague and fever and bilious complaints. The dam is up about twenty years, he thinks: witness had been there about eight years: the dam overflowed the land about Burwell's Lake: has no doubt the timber has been killed by the water. They have made no use of the mill scarcely for two years: the mill is not now in a state for use: there will be no sawing without a new mill: the mill has sunk at one end, and is in decay: can't say but there might be wet places if the dam was away, but nothing like that which exists now: defendant transacts all the business there for Brewster: he may be interested for all witness knows: all he does is recognized by the Company: he is the agent or overseer for the Company: witness lives about half a mile from the water, south: there are many inhabitants near there, and would be more but for the dam. The mill is not of the least use, it is tipped over. Defendant has said he wished they were rid of it, but that Brewster was irritated, and wanted to make the Canada Company or the Council pay for the removal of it.

Edward R. Jones—Was at the mouth of, and up the river, before the dam was built, and has been up since. Hardwood trees, which have grown there, are now dead : thinks fifteen thousand acres overflowed : is satisfied it must produce malaria to a great extent in the surrounding district. The dam occasions the injury : there is some swamp back of the river, but the dam floods back the water of the river into that low land, and covers it to a very much greater extent. Few settlers were there when the mill was built.

Jonathan Tripp had been living eight or nine miles from the dam for seven or eight years ; had seen the flooded land. Where witness lives, there is very little fever or ague : had no doubt the dam occasions it. The mill is sixteen miles from witness.

Jessie Farny—Lives in Bosanquet, four miles from the mouth of the river, and half a mile from the flooded land : has the ague there every season, when the lake subsides : offensive effluvia in the summer. Has lived there nearly eleven years : others living there before witness—three or four families. Thinks when the dam was put up, there was no inhabitant there. The dam is not so high as it was. There are some inhabitants about half a mile above the dam.

Henry Ward.—Has lived twenty-five years in Bosanquet : was there before the dam was built, but not living there : lives now near Lake Burwell : the land is flooded close to witness : some on his lot : it is a very stinking place in summer, and people have ague and chill fever.

Defendant, *Cook*—Is agent there, or foreman. Witness was the first inhabitant in the part he now lives in : thinks taking down the dam would be a great benefit as regards health : the water is now much higher than it was before the dam was built.

Charles Durand, Esquire—First saw that place twenty years ago ; has lumbered up the river twenty-five miles above the dam. An immense tract is overflowed, and in some places six feet deep, where the land was covered with hard wood trees, which are now dead. The water is flooded over portions of four townships, the dam has been up twenty three or four years.

Farrie—There is a road near the dam which is overflowed, and a bridge on which toll is exacted: thinks defendant is foreman of Brewster & Co.: Brewster & Co. are not in this country.

For the defence, it was objected, 1st, Cook being only an overseer, is not liable. 2nd. Dam up twenty years. 3rd. People came there since the alleged nuisance.

Verdict—guilty.

In Easter Term, *Eccles*, Q. C., obtained a rule *nisi* for a new trial, contending there was no evidence of a highway. There was only an unused allowance for road, which is vested in the Canada Company, not in the Crown. He also renewed the objection that Cook was only a servant, having had nothing to do with the erection of the dam, and not being the party who maintains it.

In Trinity Term, *Harrison*, R., shewed cause, citing 1 Russell on Crimes, 330; Roscoe's Crim. Ev., 778. He insisted that the erection of the dam was unlawful, therefore the continuance of it was so, citing Rex v. Crunden 2 Campb., 89.

Carroll supported the rule, referring to Brewster v. Ca. Co. 4 Grant, Ch. R. 443; Rex v. Cross, 2 C. & P. 483; 18 Modern R. 342.

DRAPEE, C. J., delivered the judgment of the court.

The defendant's counsel objected that he was not liable on this indictment, being only servant or agent for the owner of the property on which the dam was erected and maintained. He cannot justify or excuse his own acts, by the relation of agent or servant to another, if those acts were unlawful; whether he did keep up and maintain this dam was as much a fact to be proved against him, as that it was a common and public nuisance. If that was not proved, he is improperly convicted. If it was proved, then he is, by his own act, a principal in this misdemeanor, and he is not the less so if he was employed and paid by the owners of the property to look after and keep up this dam. The objection taken at the trial, and at the argument, was not that the evidence did not affect him as

really keeping up and taking care of this dam, but that what he did was done as servant to another. In this point of view, the objection is invalid. It was secondly urged that the dam had been erected upwards of twenty years. For the purpose of establishing an easement affecting the private property of others, this would be sufficient, generally speaking, but it is not so, when the consequences of this act are *ad commune nocumentum*. In R. & Cross 2 C. & P. 483, Lord Ellenborough says, "It is immaterial how long the practice may have prevailed, for no length of time will legitimate a nuisance." In Vooght v. Winch, 2 B. & Al. 662, the court expressed a clear opinion that an obstruction of a navigable river though continued for twenty years, is no bar to a public right.

The third objection was, that there were no inhabitants whom this could injure when the dam was erected, and that they have since come to the nuisance, and cannot complain. A somewhat similar defence was advanced in *The King v. Crunden* (2 Camp., 89), but it was discountenanced, and denied by the court. It would be a strange proposition if a man could for his own profit overflow some fifteen thousand acres of land with nearly stagnant water, so as to render the land surrounding and adjoining uninhabitable, except at the imminent risk of health, and to say, that having done this before there were inhabitants, they cannot complain that he is guilty of a nuisance, for they need not have come to it.

This is not an action for the private injury, but an indictment for a public wrong, and I have no doubt that this is a wrong of such character; that it is indictable although not a person lived near enough to be affected when the dam was built. The settlement of a valuable tract of land cannot be lawfully impeded or obstructed by a nuisance prejudicial to public health, any more than a public highway can be obstructed so as to prevent intercourse through the same portion of country.

I have felt a good deal of doubt whether sufficient proof was given of an existing public highway which was obstructed. But the evidence of the injury to the health of a widely

spread neighbourhood was, I think, very clearly established, and is sufficient to sustain the conviction.

I think, therefore, the rule should be discharged.

Per Cur.—Rule discharged.

STREET (DEMANDANT) V. ROWE (TENANT).

Dower—Costs.

Held, that a demandant, who had given a proper and sufficient notice of action, and no proof of an offer to assign by the tenant prior to action was given, was entitled to the costs of the action under 13 and 14 Vic., ch. 58, even in the case of judgment by default.

Hagarty, J.—Dubitante.

C. S. Patterson obtained a rule calling upon the demandant to shew cause why the suggestion filed in this cause on the 7th of April last, the judgment entered on the 26th of June last for costs, and the writ of *fi. fa.* issued thereon, and all proceedings had thereon, should not be set aside with costs, on the ground that the demandant was not entitled to enter any judgment for costs, and that the judgment is irregular.

This rule was obtained on an affidavit of the defendant's attorney, shewing that the declaration was filed on the 15th of March last, and was served with notice to plead on the same day: that on the 7th of April last, judgment by default was signed for want of a plea: that on the said 7th of April a suggestion was filed, that the demandant had caused a demand in writing of her dower on the lands described in the declaration to be made from the tenant, more than one month, and less than one year, before the commencement of this suit, and that the tenant did not at any time offer to assign to the demandant her dower: that there is also filed a demand of dower with an affidavit of service thereof on the tenant, on the 12th of February last: that the suggestion appears to have been served on the tenant on the 12th of April last, and has thereon endorsed a notice which appears to have been served therewith, and is in these words, "Take notice that you are to plead to the within suggestion within eight days, otherwise judgment:" that final judgment was signed on the 26th of June last—the roll containing the

declaration, an entry of *nil dicet* thereto, the said suggestion an entry of *nil dicet* thereto, and judgment that the said Abigail Street do recover against the said Christopher Rowe her costs of suit in this behalf, according to the statute in that behalf, which said costs of suit amount to the sum of £6 15s. 9d., and that she have execution therefor: that there appears to have issued a writ of *hab. fac seisinam* with *fi. fa.* for the said costs on the said 26th day of June: he objected, that under the 13 & 14 Vic., ch. 58, sec. 5, costs could not be recovered, unless there was a trial, when a demand of dower and a neglect or refusal to assign it being shewn, and the right itself being admitted or proved, the demandant would be entitled to costs.

James Paterson shewed cause, he cited *Bale v. Hodgetts*, 1 Bing. 182, and *Ryckman v. Ryckman*, 15 Q. B. U. C. 266; *Bishoprick v. Pearce*, 12 U. C. 306, and *Quin v. McKibbin*, 12 U. C. Q. B. 323.

C. S. Patterson, contra. The husband did not die seised, wherefore the demandant could recover no damages and consequently no costs—unless under our statute—but as the tenant made no defence and offered no opposition to her, she is not entitled to costs under the statute. This is a provision which alters the common law, and should therefore be strictly construed.

RICHARDS, J., delivered the judgment of the court.

I am of opinion the legislature intended under the statute referred to, to give costs to a demandant in dower, in all cases where the tenant had not offered to assign it to her before action, and where she had demanded it in writing of the tenant a month before the action brought, such action, however, to be brought within a year from the time of the demand having been made.

The words of the 5th section of 13 & 14 Vic. ch. 58, are, that costs shall be allowed demandant in all cases, whether damages be recoverable or not, in the same manner as costs are now allowed to a plaintiff or defendant in personal actions. Provided it shall be made to appear *on the trial* that a demand in writing had been made of the dower, &c.,

one month before action brought. Provided, also, that the tenant shall not make it appear *on the trial* that he offered to assign the dower before action brought.

In order to justify the court in awarding costs to a demandant in dower where the husband did not die seised and no damages were recoverable, something must appear on the record to bring the case within the statute, and that can only be done by introducing a statement in the declaration that the demandant had made the proper demand and the tenant had not offered to assign the dower before action brought, or by a suggestion either before or after the judgment to the same effect. If the allegation were introduced into the declaration and properly formed part of it and was not denied, is it not admitted in the same manner as any other allegation? If denied, it would be proved *on the trial* in the same manner as any other issue.

If none of the allegations in the declaration are denied, and there are no damages to assess, how could there be any *trial* or assessment of damages? It is urged, however, that it is not intended to give costs except where there is a trial of some kind, and therefore, if under the pleadings there is no trial, there can be no costs. I cannot concur in this reasoning. As I have already stated, I think the intention was to give the demandant costs where she had made a written demand of her dower and had waited a month to have it assigned to her, and the tenant before action brought had not offered to assign. If that was what was intended by the legislature, then if the facts to entitle a demandant to costs, having been denied, were made to appear *at the trial*, she would obtain her costs; if they were admitted on the record without trial not being denied, what necessity for putting the party to further costs by having what might be termed a mock trial to prove that by parol which was already proven by a higher species of testimony, viz., the record.

The course pursued by the demandant in this cause is that suggested by his Lordship the Chief Justice of this court in his judgment in Q. B., in the case of *Bishoprick v. Pearce*, already referred to, he says, "I think the statute

will be satisfied if, on the trial of any issue affecting the right to dower besides the proof in support of that issue, a demand according to the statute is also proved to entitle the demandant to costs; but if there be no such issue to be tried, nor any other question arising out of a suggestion for costs, but the fact be admitted which gives the right to costs, whether by confession or default, judgment for costs may be rendered." Mr. Justice *Burns*, in the same case, remarks, "It appears to me that the points upon which the right to costs is to depend or be disputed must appear upon the record, and each must have an opportunity of answering. And though there may be an issue raised independent of the right to costs, yet still the demandant would be obliged to enter a suggestion if she claims them, because the costs are not given merely by reason of her recovery upon the issue, but only in the event of having given notice according to the statute, which, certainly, the tenant has a right to reply to." Both the cases reported in the 12th and 15th volumes of the Q. B. reports should be referred to, as shewing the proceedings to be taken in dower. Before our statute, where the right of the demandant was not denied, she might take judgment of seisin, and afterwards enter a suggestion on the roll that she was entitled to damages, and she could have a writ of enquiry and obtain a second judgment for her costs and damages. If so, I see no reason why the demandant here may not sign judgment as to such facts as relate to her claim for dower, and enter a suggestion as to those facts entitling her by law to claim her costs, and if the subject matter of the suggestion is not denied, I think entering judgment for costs regular. The case of *Watson v. Quilter*, 11 M. & W. 768, shews that the facts stated in a suggestion to deprive a plaintiff of costs under the Court of Requests Acts, may be traversed." Lord *Abinger* observes, "In this case the right depends on a fact, the fact (or it would be error) must be assigned on the record as a reason for departing from the statute of Gloucester, and must be determined, *if disputed*, as all other facts are which are not cognizable by the court itself. The practice is of course to enter the suggestion, and if not traversed, the

facts are admitted, and if admitted, the court acts on them. I see no objection in practice or principle to the course pursued by demandant, and the rule must therefore be discharged. But inasmuch as this is a new point, and the tenant's objections seemed to be warranted by the observations of the learned Chief Justice of the Court of Queen's Bench, in the case referred to, the rule will be discharged without costs.

HAGARTY, J. doubting.

Rule discharged.

ROWE V. STREET.

Dower—Covenants.

Held, that an action for breach of covenants running with the land can only be maintained by the party between whom and the covenantor, there is privity of estate at the time of the breach.

DECLARATION.—The declaration states that Timothy Street, in his lifetime, by deed, for the considerations therein mentioned, did grant, bargain, sell, alien, transfer, convey and confirm unto the plaintiff, his heirs and assigns, all and singular that certain parcel or tract of land and premises therein particularly described. And did, by the same deed, for himself, his heirs, executors and administrators, covenant with the plaintiff, his heirs and assigns, that it should and might be lawful to and for the plaintiff, his heirs and assigns, from time to time, and at all times thereafter, peaceably and quietly to enter into, have, hold, occupy, possess and enjoy, the said granted premises, and every part and parcel thereof, with their appurtenances, without the lawful let, suit, hindrance, molestation, interruption or denial whatsoever, of him the said Timothy Street, or his heirs, or any other person or persons whatsoever, lawfully claiming, or who should or might thereafter lawfully claim any estate, right, title, trust or interest of, in, to or out of the same or any part or parcel thereof, by, from or under him, them or any or either of them, and that free and clear, and freely and clearly, and absolutely acquitted, exonerated and discharged, or otherwise well and sufficiently saved harm-

less and kept indemnified by the said Timothy Street, his heirs, executors and administrators of, from and against all, and all manner of former and other gifts, grants, bargains, sales, mortgages, leases, jointures, dowers, uses, entails, acts, arrears of rent, statutes, recognizances, judgments, titles, charges and incumbrances whatsoever, had, made, done, committed or suffered by him, the said Timothy Street, or any other person or persons, or by, through or with his, their or any of their acts, means, procurement, consent or privity. And that at the time of the ensembling and delivery of the said deed, and while the said Timothy Street was seised of the said land, he, the said Timothy Street, was accoupled in lawful matrimony to one Abigail Street, who was by reason thereof entitled to dower out of the said land if she should survive her said husband. And that the plaintiff afterwards and during the lifetime of the said Timothy Street, by deed, conveyed the said lands, with the appurtenances, to one Richard Cuthbert, his heirs and assigns, giving him covenants for quiet enjoyment. And the plaintiff further says, that after the death of the said Timothy Street, the said Abigail demanded her dower, and recovered the same in an action against the said Cuthbert, and that he was obliged to pay to the said Abigail Street an amount of £50 and costs of suit. And that the plaintiff, by reason of his said covenant, was forced and obliged to pay, and did pay and satisfy, to the said Richard Cuthbert, his damages by reason of the demand and suit of the said Abigail Street.

To which defendant demured, assigning among other causes that the plaintiff shewed by his declaration that he has no cause of action, as it appeared that before the time of the alleged eviction he sold the land to one Richard Cuthbert, and thereby parted with and deprived himself of the said deed and of all the covenants therein contained, and consequently has no right to sue thereon. That it does not appear how or by what means the plaintiff was forced or obliged to pay the alleged damages to the said Richard Cuthbert, and that at all events the plaintiff having parted with the said land, and the deed declared on, cannot maintain this action.

The case was argued in Trinity Term, by *J. Paterson*, in support of demurrer, and *C. S. Patterson*, contra.

DRAPER, C. J., delivered the judgment of the court.

The covenant sued upon passed with the land to Cuthbert, the plaintiff's assignee. The breach of it occurred after the assignment, for it was after that, that Timothy Street, from whom the plaintiff purchased the land, died, for which his widow became entitled to, and recovered judgment for her dower, which is the encumbrance complained of. There has been no eviction in fact, nor could there be of more than one-third of the premises, and that only during the widow's life. They are both what is technically called real covenants, the one for quiet enjoyment by the purchaser, the other that the land shall be holden free from incumbrances.

It is under these circumstances that the plaintiff declares upon the covenant for quiet enjoyment and freedom from encumbrances, contained in the deed from Timothy Street to the plaintiff.

Wherever there is privity of estate these covenants pass to the assignee of the land, and the assignee can maintain an action upon them in his own name against the covenantor and his heirs. If it were otherwise, they would be deemed covenants in gross, and the benefit of them could only be obtained by the assignee, by making use of the name of the covenantee or his representatives, in which mode, if the damage be one which effected such covenantee, it would be recoverable.

I do not understand upon what principle an action can be sustainable on a covenant running with the land, for a breach thereof, except by the party, between whom and the covenantor there is privity of estate at the time of the breach. Cuthbert, by the plaintiff's conveyance to him, obtained the whole estate, and therewith, as of course, the whole right to sue on these covenants, and that right is still vested in him, together with the estate. The plaintiff declares on a covenant requiring privity of estate, to enable him to maintain an action on it, and shews in his declara-

tion that no such privity exists. If he had declared on the covenant to himself, without shewing his conveyance to Cuthbert, a plea that he (the plaintiff) had no estate or interest in the land, would have barred the action, and the consequence must be the same, on the present declaration.

Whether any action will lie by the plaintiff against the defendant for the money he alleges in the declaration he has been forced to pay Cuthbert, is a question which does not arise on this demurrer. The plaintiff's liability to Cuthbert has arisen from his entering into full covenants; had he limited his covenants to his own acts and incumbrances, Cuthbert must have sued the original covenantor or his representatives for any breach of the covenants contained in the conveyance made to the plaintiff, as the plaintiff would not have been liable for a breach of *those* covenants. He now urges that, having paid damages for a breach of his own covenants, he has a right to recover them back from the representatives of the original covenantor, because the same facts prove a breach of the original covenants. If it be so, it certainly cannot be upon this declaration—and that is all we have to determine.

It is unnecessary, even as a question of costs, to consider the rule to strike out the defendant's rejoinder to the plaintiff's replication. The plaintiff's declaration being declared bad, his action fails *in toto*, and the general costs of the cause go to the defendant.

Vide Thornton v. Court, 17 Jur. 151.

THE GREAT WESTERN RAILWAY COMPANY V. FERMAN.

SPECIAL CASE.

Replevin—Taxes.

Upon replevin to recover certain goods and chattels, seized for taxes, the plaintiffs contended first, that their land was not assessed at the average value of land in the vicinity. 2nd, That no proper notice was given of the assessment. And, 3rd, That the roll was not completed within the proper time.

The defendant justified under a letter written by the plaintiff's solicitor in the following words: "In reply to yours of the 15th inst., addressed to the managing director of this company, I am directed to inform you that the only real property owned by the company, in the township of Maidstone, consists of the road way of 106 acres, and 17 acres of extra or waste land. I have not the rate at which this land has been hitherto assessed, but I presume that the average value of land in the locality cannot exceed ten pounds per acre." They also proved a notice of assessment delivered the 9th of July, 1856.

Held, that this letter did not fix £10 as the average value of the land, but only asserted that the value could not exceed that sum, and that the notice being served after the time for the revision of taxes had expired, was too late; under which they had assessed the plaintiff's land at £10 per acre, while the average value of the land, through which the railway went, was £1 10s.

This was an action of replevin for certain goods of the plaintiffs', taken and detained at the company's station, at Belle River, in the township of Maidstone, Essex.

The defendant justified the taking and detention, as collector for the said township, alleging that the plaintiffs were rated in the assessment roll for 1856, in respect of their assessable property in the said township, for sixteen pounds, eight shillings and eight pence, and that not being paid after demand was duly made, he seized the property in order to sell for the taxes.

The plaintiffs pleaded in bar to the 1st, That the land occupied by the plaintiff's road, in the township, was not assessed according to the average value of land in the vicinity.

2nd. That no notice of the assessment distinguishing the value of the road way, from the value of the real property of the plaintiffs, was delivered or transmitted by post to the plaintiffs, before the completion of the assessment roll.

3rd. The assessment roll was not completed within the time limited by law.

The defendant took issue on these pleas, not replying specially.

At the trial at the Essex assizes, before *Sir J. B. Robinson*, Chief Justice, it was proved that the average

value of the lots through which the railway is constructed, and the rate at which they were that year (1856) assessed, was one pound ten shillings per acre, and that the assessment for the portions occupied by the railway was ten pounds per acre, also that the notice of assessment, dated the thirteenth day of June, 1856, was only served on the ninth day of July, 1856.

In reply thereto the defendant put in a letter of John W. Gwynne, dated 21st of May, 1856, who it was admitted was then one of the solicitors of the plaintiffs, stating it as his opinion that the value of land in the locality *could not exceed ten pounds*.

[*Copy of Gwynne's Letter, dated 21st May, 1856, addressed to Devlin, the Township clerk of Maidstone.*]

"SIR,—In reply to yours of the 15th instant, addressed to the managing director of this company, I am directed to inform you, that the only real property owned by the company, in the township of Maidstone, consists of the roadway of $106 \frac{1}{100}$ acres, and $17 \frac{71}{100}$ acres of extra or waste land. I have not the rate at which this land has been hitherto assessed, but I presume, that *the average value of land, in the locality, cannot exceed ten pounds per acre.*"

This letter was apparently written as an answer to one dated the fifteenth of May, 1856, and addressed by the township clerk of the township of Maidstone, to the managing director of the Great Western Railway Company, calling for a compliance on the part of the company with the provisions of sec. 21, of 16 Vic., ch. 182, which enacts that every railway company shall annually transmit to the clerk of every municipality, in which any part of the road of such company is situate, a statement describing the value of all the real property of the company, other than the roadway, and also the actual value of the land occupied by the road in such municipality, according to the average value of land in such locality. After seeing Mr. Gwynne's letter, the assessor assessed the land at £10 per acre. And a verdict was entered for the plaintiffs, for 20s., by consent; subject to the opinion of the court, with power to enter a verdict for the defendants, on all or any of the issues, if in their opinion the evidence sustained such a verdict.

Irving argued the case for plaintiffs, and *O'Connor* for defendant.

DRAPER, C. J., delivered the judgment of the court.

It appears by the note of the learned chief justice, that the verdict was taken, and the leave reserved as above set forth, as the way in which the parties wish to have the case disposed of.

Upon these pleas, which are simply put in issue by the defendant, it appears to me, that the verdict on the first is rightly entered for the plaintiffs; for the land certainly was not assessed at the average value of land in the locality, but very much above it; nor do the terms, (as set forth in the case,) of Mr. Gwynne's letter fix £10 per acre, as the average value, but only that the value cannot exceed that sum. This issue does not raise the question whether the plaintiffs are too late to object that the lands are valued too high, but simply rests on the enquiry whether in fact the valuation is above the average value of lands in the locality or no.

The second plea is also, I think, rightly found for the plaintiffs. The only notice to them was that dated the 13th June, and received the 9th day of July, 1856; after the time for obtaining a revision had long since gone by; and therefore long after the time at which the assessor's roll should have been completed; but I really see no proof of the completion of the roll except in the letter of the township clerk, of the 26th of July, 1856, when he refers to it as being completed. There is some evidence to shew that it was not completed in proper time, and as the final revision is required to be (sec. 30,) finished by the 1st June, and this notice is not dated till the 13th, the inference is in the plaintiffs' favour.

There was no direct evidence given to shew at what time the assessment roll was completed, and it was incumbent on the plaintiffs to give some evidence to sustain their third plea; the verdict on this plea should therefore be entered for the defendant, unless it be sufficiently apparent by the letter of the township clerk, of the 15th May, 1856, that the assess-

ment roll was not completed then. According to the 24th section of the act, the roll should be completed on some day to be appointed by the municipal council, not later than the 15th of April. The assessor certainly swore that he saw Mr. Gwynne's letter of the 21st May, before he assessed the land, and this is enough *prima facie* to entitle the plaintiffs to succeed on this issue, as it is not in any way answered.

According to the note made by the learned Chief Justice of Upper Canada, in reserving this case for the opinion of the court, the determination of the question, how on the evidence, the issue on each plea should be found, is all that was left to us; at the argument the defendant's counsel confined himself chiefly to the second plea, arguing that the plaintiffs could not treat the notice of the assessment as too late, when they had not furnished the statement required by the 21st section of the act, until the 21st of May. But this question is not properly before us on this pleading.

Upon these pleadings, therefore, all the issues appear to me to be properly found for the plaintiffs. I had some doubt, however, whether, inasmuch as the plaintiffs were chargeable with rates and assessments, the avowry might not be properly sustained *pro tanto*; as where a man makes avowry for the taking of distress for divers rents in arrear, and it appears upon his own shewing that parcel is not due, yet the avowry is good for the residue. But the difficulty is, there is nothing by which we can certainly determine what sum the collector, the defendant, has a right to receive as rates and assessments from the plaintiffs, as the assessment and rating are each one complete sum, the one a valuation and the other the rate. The defendant does not therefore appear to come within this rule.

I think the *postea* should be delivered to the plaintiffs.

NEALE V. CROKER.

Innkeeper—Lien.

Held, that an innkeeper has only a lien, for the keep of horses, on the property of a guest.

DECLARATION stated, that the defendant unjustly detained

the cattle horses, goods, &c., of plaintiff, (i.e.,) one bay horse, one grey mare, and one set of double harness, and claims a return and damages for the detention, and for loss in the use, &c.

Pleas—1. *Non detinet*. 2. That defendant was an inn-keeper, and the horse and mare were left with him as such inn-keeper, to be fed and taken care of; that he did feed and take care of them for three months, and was entitled to be paid £9, which has not been paid, and that he detained the horse and mare as security for the said sum, and prays a return, &c. Replication to 2nd plea, that the horse and mare were not left with defendant as an inn-keeper, to feed and take care of, and that defendant of his own wrong, &c.

At the trial, in April last, at Stratford, before *Hagarty*, J., the defendant admitted the plaintiff's *primâ facie* right, unless he could maintain his claim of lien. He gave evidence that one Flannery, a hired man of the plaintiff, boarded at the defendant's inn about three months, and he brought these horses to defendant, who kept a livery stable as well as an inn. Flannery was working for plaintiff on a gravel road, and he took the horses out to work every day, and returned them at night. This went on for a long period, till defendant insisted on keeping the horses until he was paid for their feed, and refused to deliver them up on plaintiff's demand. They were thus detained a few days, until they were replevied under the writ issued in this cause, on the 14th December, 1857. There was no dispute but that something was due for the feed of these horses, although the plaintiff furnished oats for them. Flannery was called for the plaintiff, and proved the same facts in substance, that he boarded at the inn, and had these horses in charge, using them daily on plaintiff's work on the gravel road. The defendant charged six dollars per week for Flannery's board and the keep of the horses, and the plaintiff settled up with him for the horses up to some day in September last. The plaintiff himself did not board at the defendant's inn.

The learned judge expressed his opinion to be in favour of the plaintiff, and it was agreed the verdict should be entered

for him, with leave to defendant to move to enter the verdict for himself; if the court should think on these facts, from which they were to be at liberty to draw inferences, the defence could be maintained.

In Easter term, *J. Duggan* obtained a rule *nisi* accordingly.

C. Robinson shewed cause, arguing that the plaintiff's servant was not a traveller; the inn-keeper was not bound to receive him on the footing on which he lived there; there was no lien therefore on these horses, as on the goods of a guest coming to the inn. Nor did he receive the horses to feed entirely, for plaintiff furnished the oats. Moreover, from the course of dealing, it appeared that the defendant had no continuing right of possession. The plaintiff, or his man Flannery, had and exercised the right to take them out every day to work; and he could not stop them from going out daily, if, as the evidence shows, he was to keep them by the week, for until the end of a week there would be nothing actually due to him. He cited *Story on Contracts*, s. 745-6; *Smith v. Dearlove*, 6 C. B., 132; *Dixon v. Dalby*, 11 U. C. Q. B. 79; *Whiting v. Mills*, 7 U. C. Q. B. 450; *Francis v. Wyatt*, 3 Burr, 1498; *Jackson v. Cummins*, 5 M. & W., 342; *Broadwood v. Granara*, 10 Exch. 417.

See also, *Parsons v. Gingell*, 4 C. B. 545; *Snead v. Watkins*, 1 C. B. N. S., 267; *Orchard v. Rackstraw*, 9 C. B. 698; *Forth v. Simpson*, 13 Q. B. 680; *Turrill v. Crawley*, 13 Q. B. 197.

In Trinity Term *John Duggan* supported his rule.

DRAPER, C. J., delivered the judgment of the court.

The law, upon the authorities cited by Mr. Robinson, and others which I have referred to, seems beyond doubt; and the facts I think clearly shew, that there was no lien attaching in defendant's favour on these horses. The plaintiff was not a guest at his inn, the plaintiff's servant, who brought the horses there to the stable, was not living in the inn, nor did he come there as a guest within the common law meaning of that term; the defendant had not a continuing possession, nor any right to it, and there is evidence that the horses were kept on a special agreement by the week.

I have no doubt the rule should be discharged.

HARRINGTON V. MARSH.

Chattel mortgage—Bona fides.

The plaintiff claimed the goods—the subject matter in dispute—under a chattel mortgage, duly filed. The main question on the trial was the consideration for which the mortgage had been given, in support of which the plaintiff proved that the consideration arose mainly for goods left in the mortgagor's possession, by the plaintiff's grandfather.

The jury having, on the trial, found for the plaintiff, the court refused to interfere.

First count.—Trespass for taking plaintiff's goods. Second count.—That plaintiff had the reversionary right and interest in certain goods, then in the possession of one John Mikel, and that defendant seized them out of Mikel's possession, and absolutely sold, and converted, &c. Third count, for wrongfully seizing the goods, and damaging them while wrongfully in their possession.

Pleas—1st. Not guilty. 2nd. To first count, not possessed. 3rd. To second count, not possessed of the reversionary property. 4th. To third count, not possessed.

The case was tried before *Draper, C. J.*, at Picton, in April, 1858. A chattel mortgage, dated 23rd October, 1856, and filed in the office of the clerk of the county court, was put in for plaintiff, and admitted By it John Mikel, in consideration of £151 6s. 9d., bargained and sold to plaintiff two horses, four cows, eight sheep, one lumber waggon, one lumber sleigh. one buggy waggon, one plough, two steers, five calves, one plough, one harrow, one set double harness, twenty-three bushels of rye in the ground on lot No. 106, third concession Ameliasburgh, five tons of hay, oats and buckwheat then in the barn, together with all his household furniture, consisting of beds, bedding, two stoves, cooking utensils, crockery, knives and forks, tables, chairs, bedsteads, and every other article in the house, subject to become void on payment to the plaintiff of £151 6s. 9d., with interest, within one year from the date. It was also admitted that all the defendants were execution creditors of Mikel, except Marsh, and that he was a bailiff of the division court.

Mikel was called as a witness. He swore he was indebted to the plaintiff in the sum mentioned in the mortgage. He said that after the death of the plaintiff's father, and when plaintiff was six or seven years old, he (Mikel) married

plaintiff's mother. That plaintiff was brought up by his grandfather Zachariah Harrington, who died in 1843. That the grandfather gave to Mikel three cows, seven sheep, and a yearling colt, to double every four years, for plaintiff's benefit, and that Mikel gave the grandfather a writing to that effect. That plaintiff's uncle, William Harrington, had this writing, and came to him (Mikel) at the expiration of the second four years, and it was agreed between them to renew the agreement for the plaintiff's benefit for four years more. The plaintiff came of age in 1855, or about twelve years after his grandfather's death. Mikel further stated, that in 1852 he gave a note to plaintiff for \$470, which settled up every thing between them to that date, the uncle William Harrington consenting on plaintiff's behalf; that plaintiff then gave him \$20, and the note was drawn, payable in five years, and formed part of the consideration for the mortgage; that he (Mikel) was not in debt to any one else when he gave this mortgage. He further stated, that after plaintiff came of age he advanced him (Mikel) a further sum of \$42, and besides this there was an agreement between them to put in grain on shares, and the plaintiff was either to have one-third, or to get \$13 per month, for his own labour, and that of his horse, which last, he finally agreed to take amounting to eight months' wages, and he advanced Mikel a further sum, in all amounting to about \$130, and that all these sums together made up the consideration mentioned in the mortgage. He further stated that he had paid plaintiff £39 on account, by giving up to him all the property mentioned in the mortgage which defendants had not taken. William Harrington was also called, and gave evidence of a similar purport as to the property being in the hands of Mikel to double, and respecting the settlement at the end of the four years. The defendant cross-examined these witnesses, and called others to impeach the *bona fides* of the mortgage, shewing that plaintiff had always made his home at Mikel's, and throwing doubt upon the truth of the statements as to Mikel being indebted to him. He proved the various amounts in which Mikel was indebted to the defendants, (except to the bailiff.) He also gave evidence

to establish that the property taken was worth much less than the sum at which Mikel had valued it. The mortgage was only executed a few weeks only (two or three) before the seizure by the bailiff. The case went to the jury to determine whether there was a good consideration for the mortgage; whether it was made *bonâ fide* to secure an existing debt, either as regarded the property said to have been put into Mikel's hands by plaintiff's grandfather, or on the other accounts set up. According to the plaintiff's shewing he would be entitled to £126, and interest on the mortgage. It was left to the jury to find, if they sustained the mortgage at all, what amount was due to the plaintiff upon it, for that would regulate the amount of damages.

They found for plaintiff and £60.

In Easter Term, *Fitzgerald* obtained a rule *nisi* for a new trial on the law and evidence, and on affidavits of two of the defendants, on two points. 1st. That they were taken by surprise at its being set up that the plaintiff had any claim against Mikel for property delivered to Mikel by plaintiff's grandfather; and that if they had been aware of such pretence, they could have proved that plaintiff's grandfather was, for many years before his death, a pauper, and owned no property whatever. 2nd. That when the cause was called on several of defendant's witnesses had not arrived, and among them one Coltman; but feeling sure they would come in time, no application was made to postpone the trial. That Coltman did not attend; that he was subpoenaed, and they expected to prove by him that the property mentioned in the mortgage, exclusive of that sold by the bailiff, was of sufficient value to pay the amount alleged to be due by Mikel to the plaintiff, and that such property remained in Mikel's possession long after the bailiff had sold and taken away the other portion.

In Trinity Term, *Walbridge*, Q. C., shewed cause. He filed the affidavits of plaintiff, Mikel, of Sarah Mikel, plaintiff's mother, and of his uncle, William Harrington, confirming the statement at the trial, that plaintiff's grandfather had delivered the property to Mikel to double for plaintiff's benefit, and denying that the grandfather was

a pauper as suggested. And as to Coltman, the plaintiff swore, that he saw him after the trial; that Coltman stated he had been subpoenaed, and that he had gone to Kirkland, one of the defendants, and had told him he knew nothing about the cause, and returned to him the subpoena and two dollars, which Coltman had received with it.

DRAPER, C. J., delivered the judgment of the court.

It was a case purely for the jury, and no complaint is made of the manner in which it was submitted to them. There were circumstances calculated to excite doubt and strong suspicion. The relationship of the parties—plaintiff living at Mikel's—the probability of the arrangement, as represented by Mikel, of the grandfather leaving property for plaintiff's benefit—the leaving every thing in Mikel's hands after plaintiff came of age—the fact that the chattel mortgage was executed shortly before the bailiff came to levy, were, with other circumstances, brought pointedly under the notice of the jury; and they were told to decide for plaintiff or defendant, accordingly as they determined whether this mortgage was fraudulent or not. Had they found for defendants, I do not think I should have felt inclined to interfere, while at the same time I cannot take on myself to say the jury were not quite right in believing the plaintiff's witnesses. There was nothing improbable in the grandfather desiring to make a small provision for his grandson, the intermediate benefit of which would be also experienced by his mother. The fact itself is too distinctly proved to leave any doubt, unless we assume that those who swear to it have committed perjury; and if it be true, there is a solid basis for the subsequent transactions, which gave this plaintiff a right of action; and if he had that right, the amount of damages is certainly not excessive. On the whole, I am of opinion the rule should be discharged.

Per Cur.—Rule discharged.

BALL V. YOUNG.

Possession—Ejectment—Pleading.

Held, that proof of a paper title is *primâ facie* sufficient to maintain trespass *quare clausum fregit*. *Held*, also, that under the pleas "not guilty" and "the close not the plaintiff's," it is open to the defendant to prove that the trespass was not committed on the lot upon which it was alleged to have been committed.

TRESPASS, for breaking and entering lot No. 24, township of Thorold, destroying fences, cutting and carrying away timber.

Pleas—1st. Not guilty, and, 2nd. The close not the plaintiff's. The trial took place at Merrittsville in March last, before *McLean*, J. A great deal of evidence was given to establish the true boundary of this lot, which is in a triangular block of land, forming part of the township of Thorold, and adjoining the township of Grantham. The only evidence of the original survey was, first, a tracing of part of the plan, which is in the Crown Lands office, and according to which, the line dividing lots Nos. 37 and 38, in the township of Thorold, being protracted northerly on the same course, would form the boundary of the western side of the lot No. 24, as asserted by the defendant. And, 2nd, an extract from the report made by deputy surveyor, Augustus Jones, of his survey made in 1788, of Thorold, "This survey was commenced at the western boundary of Stamford, and the side lines run, leaving the lots in rows or tiers the (?) lying north and south, and beginning with the first number or row of lots, and including in the survey of the lots an allowance for road of one chain posted off for road, and the end of each concession and the marks along the lines were performed in the same manner as before-mentioned in Niagara." According to this extract, it would seem that the easternmost lot in this gore was numbered 1. No lot was numbered in the gore higher than 24, though the gore itself extended as far as the west side of lot No. 39, before it came to a point on the concession road. Neither party put in any patent from the Crown either for No. 24, or for that part of the gore lying north of No. 38 and 39, which is claimed by defendant. The plaintiff produced a

deed to himself from one Waterhouse, dated the 21st October, 1815, for lots Nos. 23 and 24, in the gore, but he had not taken actual exclusive and corporal possession of the piece of land in dispute (about four and a-half acres) until about February, 1857, when he put up a fence on what he asserted to be the west line of No. 24, which fence the defendant threw down as soon as he was made aware of its erection, which was the trespass complained of. Each party gave evidence of acts of ownership by occasional cutting of trees or other isolated acts of that description. The land in dispute was uncultivated, never having been actually cleared, though many trees had been cut off it. The evidence of the post marking the northerly angle between 37 and 38, being probably on the very spot where the original stake was planted, was very clear, while equally strong evidence was given to establish a post between Nos. 22 and 23, in the gore, and on the road dividing the townships of Grantham and Thorold.

The jury were told that if plaintiff was in possession of the land, and the jury thought it was part of the No. 24, to find for plaintiff; but if defendant had held possession for twenty years, or if he was in possession at the time of the alleged trespass, to find for defendant.

They found for the plaintiff, 1s. damages.

In Easter Term, *Harrison, R. A.*, obtained a rule *nisi* for a new trial on the law and evidence, and for misdirection.

In Trinity Term *Patterson* shewed cause.

Harrison, in support of his rule, contended that the jury were misdirected, for that the plaintiff shewed only a paper title, which was insufficient. That in order to maintain trespass *qu. cl. freg.*, he should have proved himself to have actual possession of the *locus in quo*. He cited *Bertie v. Beaufort*, 16 Ea. 33; *Rex v. Watson*, 5 Ea. 485; *Bac. Abr. Trespass, C.*; *McNeil v. Train*, 5 U. C. Q. B. 91; *Richards v. Peake*, 2 B. & C. 918; *Smith v. Royston, M. & W.* 381.

DRAPER, C. J., delivered the judgment of the court.

I have examined *Mr. Harrison's* authorities, *Bertie v.*

Beaumont, 16 Ea. 33, does not touch the point, it merely decides that where a master allows his hired servant to occupy a cottage, paying him less wages per annum on that account, the master may properly declare on this as his own occupation in an action for disturbance of a right of way over defendant's close to such cottage. *Rex v. Watson*, 5 Ea. at p. 485, contains only the statement of counsel that occupation properly speaking implies possession, and trespass can only be brought by him who is in possession of the land. *Richards v. Peake*, 2 B. & C. 918, shews that where the issue was, whether a certain close in which, &c., named, &c., was and had been for thirty years and more divided from the common (a right to use which the defendant, in his plea, set up by prescription) in severalty and adversely to the right claimed by defendant, and the jury found that part had been inclosed within thirty years, and that the trespass complained of was in that part; that the defendant was entitled to the verdict, whether the allegation respecting the close in which, &c., was entire or divisible. If entire, then the plaintiff was bound to prove the whole inclosed upwards of thirty years; if divisible, it was confined to the part as to which the defendant justified, and if that was not inclosed for thirty years, it mattered not if the other part had been. *Smith v. Royston*, 8 M. & W. 381, decides that on a plea of *liberum tenementum* to a declaration for trespass to a close named, the defendant is entitled to a verdict if he establish a title to that part of the close on which the trespass was committed; he need not prove a title to the whole close. In *McNiel v. Train*, 5 U. C. Q. B. 91, the Chief Justice, in giving judgment, states, "It must appear that the plaintiff was in actual and immediate possession of the land in order to maintain trespass. This observation had reference to an issue joined on a plea like the 2nd in this case, that the close was not the plaintiff's. In the course of the evidence, it appeared not only that plaintiff had not the title, but that the defendant had the paramount right, and that the plaintiff had recognised it, and it therefore certainly was incumbent on the plaintiff to prove an actual possession of the *locus in quo*. But it is a very different thing to

assert that proof of actual title in fee is not enough where the possession is vacant, except so far as the title draws the possession to it.

It was open on these pleadings for the defendant to shew that the trespass proved—*i.e.*, the removal of the fence and the cutting of a tree or so—was not committed on No. 24. For, unless it was, the plaintiff had not proved the cause of action stated in his declaration. 2nd. The defendant might shew that No. 24 was not the plaintiff's close.

As to the first issue, there was evidence both ways, *i.e.*, that the acts charged as trespasses were, or were not, committed on No. 24. The evidence shewing that the plaintiff had actually inclosed the land by putting up this fence, whereby, as I understand, he inclosed the land, which constituted No. 24, in his view would tend in itself to shew that he had taken possession in fact, of this piece of land, and the defendant's act, in throwing down the fence, was *prima facie* an act of trespass, and if the declaration had been differently framed, might have driven him to justify by shewing title; which, on the the present occasion, he has not done, though he has given evidence tending to shew acts of ownership of this particular four and a-half acres. There was no doubt that the defendant had committed the acts charged as a trespass; whether upon lot No. 24, was a question of fact on the evidence irrespective of the question of possession or title upon this issue.

Then as to the second, the defendant sets up no title in himself. He does not justify by asserting a right to do the act complained of, as done upon land of his own, not being No. 24, but he denies that the close in which, &c., is the plaintiff's. What close? No 24 is that named in the declaration, and therefore, is that to which the plea applies. The burden of this issue is on the plaintiff. As against a wrong-doer, he might prove possession in fact, without more, and he would have been entitled to succeed on this issue. But *Mr. Harrison's* proposition is, if I have not misunderstood him, that he must prove such possession, and that proof of title in fee will not, without proof of actual visible occupation, entitle him to a verdict. To this doctrine I

cannot subscribe. If it were so, the owner in fee simple by grant from the Crown of a lot of wild land, would not sustain his case on this plea against a wrong-doer by the mere production of the grant. He must prove an actual possession in fact, as distinct from the possession which the latter draws to it, when there is no adverse occupation. I think the plaintiff entitled to a verdict on this issue on mere proof of title, to No. 24. And, moreover, there was abundant evidence that he had occupied No. 24 under this title upwards of thirty years, and was, as a consequence, in actual possession of the *locus in quo*, if it was part of 24, no one else being in actual possession. See *Butcher v. Butcher*, 7 B. & C. 399, recognised in *Hey v. Moorhouse*, 6 Bing. N. C. 52.

On this ground, therefore, there is no pretence for disturbing the verdict. A careful perusal and consideration of the evidence has inclined me to think the weight of it was in defendant's favour as to the true boundary of No. 24, in other words, as to the plaintiff's right to have succeeded on the plea of not guilty. From the evidence given of the mode of survey, I should rather conclude that the line between 37 and 38, being satisfactorily established, would have proved the western boundary of No. 24 by a simple protraction of that line. And if this verdict would be conclusive of the right, I should be disposed to grant a new trial. But the verdict on the first issue proves no more than that the defendant has committed a trespass upon No. 24, and on the second, that the plaintiff owns No. 24. Both these points are conclusively established between the parties. But I do not understand the finding on the first issue to determine the legal boundaries of No. 24, and that on the second certainly does not. No abutments appear on the record, and though the defendant will be estopped from denying that the plaintiff, at the particular time, owned No. 24, and that he at the time trespassed on that lot, he will not, I apprehend, be estopped by this record from contesting what the actual boundaries of No. 24 are. Considering this to be a verdict for a shilling only, in an action not binding the right really set up, I am in favour of discharging the

rule. The defendant might have pleaded title, setting out the boundaries, and denying that the *locus in quo*, not admitting it to be No. 24, was the plaintiff's close.

Per Cur.—Rule discharged.

RE DAVIS V. MUNICIPALITY OF CLIFTON.

By-law—Town regulations—Nuisance.

Held, that the statute 16 Vic., ch. 35, does not authorise the passing a by-law to prevent a nuisance not in itself unlawful.

W. Eccles obtained a rule, calling on the town council of the town of Clifton, to shew cause why a by-law entitled, "A by-law to prevent persons called runners or guides exercising their calling in the town of Clifton," should not be quashed, because the town council had no power by law to make or pass said by-law, or to prohibit persons from acting as guides, or to solicit persons to go to their taverns, boarding houses, or museums, and the said by-law being illegal in other respects.

The by-law recited the statute 16 Vic. ch. 35, and that the municipality of the township of Stamford under that act, on the 19th of August, 1854, passed a by-law which aggravated the evil. That for divers reasons a part of the township of Stamford was incorporated as the town of Clifton by 19 Vic., ch. 63, with all the powers by law conferred upon incorporated towns in Upper Canada. And that it is necessary in order to secure the good government, peace, and prosperity of the town of Clifton, and the safety and security of the visitors to the falls of Niagara, that a stop be put to persons calling themselves runners, exercising their calling within the limits of the town of Clifton. And it enacts, that it shall not be lawful for any person to solicit passengers, visitors, or others, except at a railway station or steamboat landing, to go to any inn, tavern, boarding house, or museum, or other place of resort, or to act as a runner or guide within the limits of the town of Clifton. It defines what shall be considered acting as a runner or guide, and subjects persons so acting to fine and imprisonment. Provided that nothing in the by-law shall be construed to

hinder the owner, occupant, or lessee of any inn, tavern, boarding house, or museum, or other place of resort, or their servants, from soliciting patronage at any railway station or steamboat landing in the town.

Lawder shewed cause. He referred to 12 Vic., ch 81, sec. 81, subsec. 4, which gives power to town councils to make by-laws, among other things, for preventing runners, stage drivers, and others in the streets or public places, from soliciting and teasing passengers and others to travel in any boat, vessel, stage, or vehicle, and to sub-sections 9 and 10 of the same section, the first of which gives power for making all such by-laws as may be necessary and proper for carrying into execution the powers vested in the corporation of such town, or in any department or office thereof, for the peace, welfare, safety, and good government of such town, as they may deem expedient, not being repugnant to the general or statute law of the province, and to the 10th, for the repeal, alteration or amendment of by-laws, and making others in lieu thereof.

Carrall, contra, insisted that the by-law went clearly beyond the powers conferred.

DRAPER, C. J., delivered the judgment of the court.

The 16 Vic., ch. 35, recites the necessity for "*more stringent provisions than now by law exist*" in respect to licensing (among others) runners and other persons soliciting visitors to resort to taverns or public places, or acting as guides to the objects of curiosity in the vicinity thereof, and it gives powers to the municipal council of the township of Stamford to make by-laws, to prohibit any person from soliciting passengers, visitors, or others to resort or go to any inn, tavern, or boarding house, museum, or other place of resort, without having first obtained from the corporation a license, and to prohibit persons acting as guides without a license, and to regulate and license the owners of livery stables, horses, cabs, &c., used for hire, and to compel prompt payment by persons hiring the same, and to prevent runners, stage drivers, &c., (repeating verbatim the words of subsec. 4, of sec. 81, 12 Vic., ch. 81,) which did not extend to town-

ships. The 19 Vic., ch. 63, sec. 10, enacts that the town of Clifton shall cease to form a part of the township of Stamford, and shall, to all intents and purposes whatsoever, form a separate and independent municipality, with all the privileges and rights of an incorporated town in Upper Canada.

I would gladly uphold this by-law, which I doubt not is founded on good sense and practical experience of the nuisance it proposes to remedy. I fear, however, it is *ultra vires* of the corporation. The general authority referred to by Mr. Lawder, as given by sub-sec. 9, of sec. 81, is not more extensive than that given by sub-sec. 32, of sec. 31, of the same act, (12 Vic., ch. 81,) to the corporations of townships, and we have a legislative declaration (by 16 Vic., ch. 35) that did not give powers to prohibit runners and guides. It is true that act authorises a licensing system under which a local revenue arising from license fees was to be derived, but that is not the sole object of the legislature, nor do I think it the leading one, which I take to be subjecting such persons to strict control; for the corporation of Stamford could make the license subject to such conditions as they might deem reasonable to enact by by-law. The absolute prohibition of any particular occupation, not in itself unlawful, and only a nuisance from its abuse, cannot, I think, be held to come fairly within the general power to make by-laws for the peace, welfare, and good government of a town, when we look at the authority specially given over particular matters in the same act, and some in reference to matters of so nearly a similar character as almost to warrant the application of the maxim *expressio unius est exclusio alterius*. I think the rule must be made absolute with costs.

Rule absolute.

WEEKS ET AL. V. LALOR.

SPECIAL CASE.

Replevin.

The plaintiff sold one "F." certain goods, taking notes in payment, a written agreement being entered into that unless the notes were promptly paid the property did not vest. F. sold the property to defendant, giving him notice of the plaintiff's claim. The notes not being paid, the plaintiff replevied the goods. Upon a special case submitted to the court, *Held*, that the plaintiff was entitled to recover.

This was an action of replevin, brought by the plaintiffs against the defendant to recover certain goods and chattels, namely, one iron plain and one lathe, in which action issue having been joined, a verdict was taken at the last assizes for one shilling damages, and by the consent of J. E. Start, attorney for the plaintiffs, and C. D. Read, attorney for the defendant, and by the order of *McLean, J.*, the following case was stated for the opinion of the court:

The plaintiff declared as follows: for that the defendant wrongly detained the goods and chattels, that is to say, one iron planer and one lathe, the property of the plaintiffs, being of the value of one hundred pounds, against sureties and pledges, and the plaintiffs claim a return of the said goods and chattels, and ten pounds for their detention.

To which the defendant pleaded, not guilty.

And for a second plea, the defendant says that the said goods and chattels at the time when, &c., were the property of the defendant and not of the plaintiffs.

And third, not possessed.

The plaintiffs were mechanics, residing in the city of Buffalo, and the defendant at the time of the transaction lived in this country.

One James Ferris obtained the articles mentioned in the declaration from the plaintiffs under the following agreement:

"Buffalo, July 1st, 1856.

"\$338

"Received from Weeks & Warren one lathe, (Paishly) and one No. 10 planer, delivered to us this day under a bargain for the sale thereof, and for which I have given notes at three and six months for \$194 each.

"And it is expressly understood that said Weeks and

Warren neither part with, nor do we acquire any title to the said lathe and planer until said notes are fully paid, and in case of default of payment thereof at maturity, said Weeks and Warren are hereby authorised to enter our premises and take and remove said lathe and planer, and collect all reasonable charges for the use of the same.

(Signed)

“FERRIS, INCH, & Co.”

Said Ferris was at this time in partnership with two other persons, named Ince and Groforth, and they were then carrying on business together. The bargain for the articles in question was made by Ferris with one Sared Kelly, the travelling agent for the plaintiffs in the city of Hamilton, on the 1st of July, 1856; and the aforesaid written agreement was signed by said Ferris, of Ferris, Inch & Co. The articles were actually delivered to him prior to his signing the said agreement; but the same was dated on the day the goods arrived in the city of Hamilton; and the agreement in writing contains the precise terms upon which the said articles were obtained; both bargain and agreement being respectively made in the city of Hamilton aforesaid.

In a short time thereafter Ferris bought from his co-partners, Ince and Goforth, their interest in all the partnership estate and effects, which were transferred to him, and he then entered into co-partnership with the defendant, under the style and firm of Lalor and Ferris; but the articles in question were not put into this co-partnership business, but held by said Ferris as his own property, although used by the said firm. That both before and at the time of the formation of such last-mentioned co-partnership said Ferris informed the defendant with reference to the said articles, that he Ferris was due the plaintiffs some moneys thereon; and that if he did not pay the same punctually according to his agreement they would take them away.

At the time the books of co-partnership were opened between them, and shortly after the same began, it was agreed that the articles in question should be considered as co-partnership property between them, upon the understanding that said Ferris should be allowed to draw out of the firm moneys sufficient to pay the amount still due, and owing

said plaintiffs on the same, and that such amount, to be taken as aforesaid, should be charged against said Ferris in the books of the said firm. That this co-partnership business was carried on until the month of March, 1857, when the same was dissolved, and said Ferris assigned to the defendant all his interest in, amongst other things, the articles in question. That Ferris drew out of the said firm of Lalor & Ferris one hundred and twenty-five dollars of the co-partnership funds, which he paid to the plaintiffs shortly after the first note given by Ferris, Ince & Co., fell due as part of the purchase moneys of the articles aforesaid. That after the books of the firm of Lalor and Ferris were opened, said ferris gave a chattel mortgage to one Thomas Gray, of the city of Hamilton, grocer, upon or of the same articles, as well as other property, to secure a private debt due by him individually to said Gray, who was informed by said Ferris, before the making thereof, that if the said articles were not paid for that they would be taken away, under a document drawn up to that effect between him and the plaintiffs, and were included in said mortgage at Gray's request. That the following are letters from the plaintiffs in their handwriting relating to the same articles :

"Buffalo, November 7th, 1856.

"MESSRS. FERRIS, INCE & Co.

"Gentlemen,—Your remittance of one hundred and twenty five dollars came duly to hand, for which, please accept our thanks. It came in a good time, as we wanted it very much. The balance we understood would be forthcoming the first of this week. We shall be pleased to receive as early as convenient, and if you are in want of any more tools we shall be pleased to sell them to you.

"Yours truly,

(Signed)

"WEEKS & WARREN."

"Buffalo, June 28th, 1856.

"MESSRS. FERRIS, INCE & Co.

"Gentlemen,—We have forwarded from New Haven, Conn. to your address 1 No. 10 planer\$225
Boxing..... 5

"The above planer passed through this place yesterday, and was safely delivered to the Great Western Railway. Our agent, Mr. Kelsey will call on you in a few days.

"Yours truly,
(Signed) "WEEKS & WARREN."

"*Buffalo, October 3rd, 1856.*

"MESSRS. FERRIS, INCE & Co.

"Gentlemen,—Your note has been protested. Please remit us the amount together with protest fees, \$1 50c., and we will forward you the note at once. Had it been in our hands it would not have been protested, but it was used where it was beyond our control.

"Yours truly,
(Signed) "WEEKS & WARREN."

And the following is an account or invoice of the said articles received by said Ferris from the said plaintiffs :

"*Buffalo, June 27th, 1856.*

"MESSRS. FERRIS, INCE & Co., To WEEKS & WARREN, DR.	
1856, May, 27, 1 Lathe & Boxing.....	\$158 00
" June, 27, 1 No. 10 Planer.....	225 00
Boxing.....	5 00

388 00

"One note ninety days, from the 1st of July, 1856. One six months from July 1st, 1856. Each note \$194."

That the notes mentioned in the written agreement between Ferris and the plaintiffs fell due before the commencement of this suit, and had not been paid or satisfied to any greater extent than the sum of one hundred and twenty-five dollars, as aforesaid. That the goods mentioned in the declaration being the articles aforesaid were in the possession of the defendant before and at the time of the commencement of the suit, and detained by him upon demand made by the said plaintiffs under their agreement, and before action brought.

The question for the opinion of the court was, whether the said defendant lawfully detained the goods mentioned in the declaration as against the plaintiffs.

Start for plaintiff, cited 13 M. & W. 27, *Lanyon v. Toogood*.

D. B. Read argued for defendant.

DRAPER, C. J., delivered the judgment of the court.

It was admitted for the defendant that by the original agreement the plaintiff had a clear right to re-take the property on non-fulfilment of the conditions of payment, but it is contended that they have altered their original position by their subsequent contract.

The only thing they are shewn to have done appears to be, that they have abstained from prompt assertion of their rights, and have received a partial payment of one note, after the time when it ought to have been paid, not being as urgent on insisting upon payment as they might have been.

The bargain for the purchase of the goods is made on the 1st of July, 1856. They were to be paid for in two payments, to secure which promissory notes, one at three, the other at six months, were given. On the first note, \$125 has been paid, leaving \$69 and interest due. On the other, no payment has been made.

Ferris, the purchaser, entered into a co-partnership with the defendant in 1856, (the precise date is not shewn,) after the goods were in his possession, and giving the defendant full knowledge of the terms of this agreement with plaintiffs. By agreement and understanding between defendant and Ferris, the sum of \$125 was paid to plaintiffs out of the partnership funds. In March, 1857, this partnership was dissolved, and Ferris assigned all his right and interest in the partnership, and in these articles, to the defendant, who insists on holding them as his own property, against the plaintiffs, who have not been paid for them.

I see no ground whatever for the defence. The defendant knew the real state of the transaction when he entered into partnership with Ferris, and the right he has to the possession of the goods was derived from Ferris, with full notice. How can he claim to hold them by a better right than Ferris had? The defence appears to me unreasonable and unjust.

I think the *postea* should be delivered to the plaintiff.

Per Cur.—*Postea* to plaintiff.

BOYES V. MCGREGOR.

Mortgage—Equitable plea—Demurrer.

Upon an action brought on a covenant in a mortgage given by the defendant to the plaintiff, being for the balance of a lot purchased by defendant from plaintiff, the defendant pleaded that one "L." had commenced a suit in Chancery against one J. B., together with plaintiff and defendant, founded on a contract made by said "J. B." before the conveyance to defendant, for the sale to him of the same land.

Held, bad, on demurrer, as for any thing therein contained, the defendant bought with the knowledge of "L.'s" claim.

The declaration set forth that on the thirtieth day of January, in the year of our Lord, one thousand eight hundred and fifty-six, a certain indenture of mortgage, sealed with his seal, and dated the day and year last aforesaid, covenanted (amongst other things) to pay to the plaintiff the sum of one hundred pounds on the thirtieth day of January, in the year of our Lord, one thousand eight hundred and fifty-eight, together with interest at the rate of six per cent. per annum on the sum of five hundred pounds, as by the said indenture of mortgage more fully appears.

To which the defendant pleaded equitably that the defendant bought the land in question from plaintiff, received a conveyance, and gave back a mortgage to pay £500, part of the purchase money and interest. The defendant asserts in his plea that the plaintiff's title to this land is defective, but all he shewed as the defect, is that one Lawson had brought a suit in Chancery against one James Boyes, plaintiff, and defendant, founded on a contract made by James Boyes with Lawson to sell to him the same land made before the conveyance to defendant, and if Lawson recovers, defendant will be ousted. That plaintiff had only James Boyes' title.

Replication, that before the sale and conveyance defendant had full notice of the defect in the title.

Second replication, that after the making of the deed by plaintiff to defendant, defendant made a mortgage to plaintiff, and therein covenanted that defendant was lawfully, &c., seised, &c., of an estate of inheritance in fee simple in the premises, and had good right to convey, and therefore he has no remedy either at law or in equity.

Third demurrer to the plea. 1. Defendant could have no relief in equity on the facts stated. 2. If defendant had

any relief in equity it would not be on the value of an unconditional injunction against the plaintiff. 3. That defendant has sustained no damage as yet, and cannot plead *quia temet*.

Demurrer to the replication (the second apparently), that defendant's covenant does not estop him. The first replication is not noticed.

Adam Wilson, Q. C., supported the demurrer. If the conveyance be actually executed, the purchaser can obtain no relief though the purchase money be secured. Were it otherwise, no vendor would permit part of the purchase money to remain on mortgage of the estate if he were liable to lose it, supposing the estate to be recovered by a person against whose acts he has not covenanted. In practice, "where part of the purchase money is permitted to remain on mortgage, although the covenants from the vendor be limited, the vendee invariably enters into general unlimited covenants in the same manner as he would have done in the case of an independent mortgage." *Sugden V. & P.* 13 Ed. 443; *Thomas v. Powell*, 2 Cox 394; *McCulloch v. Gregory*, 23 Law Jour. Ch. 656; *Bree v. Holbeck* Dougl. 654; *Cripps v. Reade*, 6 T. R. 606; *Johnson v. Johnson*, 3 B. & P. 162; *Tylee v. Weeb*, 14 Bea. 14; *Maynard v. Mosely*, 3 Swand. 651.

DRAPER, C. J., delivered the judgment of the court.

The defence set up to the covenant declared on is, that before making the mortgage containing the covenant sued upon, the defendant bought the land mortgaged from the plaintiff for £750, paying £250 by negotiable promissory notes, and giving this mortgage to secure the balance. That the plaintiff's conveyance to the defendant contained a covenant that the plaintiff had the right to convey, and that defendant should have quiet enjoyment free from incumbrances. That the plaintiff's title to the land at the time of making the conveyance to the defendant and the mortgage to the plaintiff was and still is defective, and that he had not, nor has he now, the right to convey. That a suit has been commenced in Chancery by one James Lawson against one

James Boyes, and the plaintiff and defendant, in which Lawson claims specific performance of an agreement between him and James Boyes, entered into before the said conveyance and mortgage, whereby James Boyes, being then seised in fee of the land, contracted to sell to Lawson. That if Lawson recovers, defendant will be ousted from possession and lose the land. That plaintiff derived his title from James Boyes, and has no better or other title than he had. The plaintiff demurs to this plea on the grounds that on the facts stated the defendant could obtain no relief in equity, or if any, it would not be in the nature of an unconditional and perpetual injunction, and that defendant shews no present damage, and cannot plead *quia timet*. He also replies, that defendant's mortgage, made after plaintiff's conveyance to him, contains a covenant that he was lawfully, &c., seised of an estate of inheritance in the premises, and had good title and right to convey. To which defendant demurs, insisting that he is not thereby estopped from setting up the facts contained in his plea as a defence.

No one appeared to argue in support of defendant's plea or demurrer, and according to the usual practice, the plaintiff is entitled to judgment. It appears to me the defence cannot be sustained, for I think the plea bad, *non constat* for any thing in it, that defendant did not purchase with full knowledge of Lawson's claim, and I presume he must have done so, or Lawson would have no right as against him. If he has thus deprived himself of protection in that suit, he has no equity to resist the action on his own covenant. But on the ground that he is shewn to be a purchaser who has taken a conveyance and given back a mortgage with unlimited covenants, I think his plea bad. I refer to Sugden V. & P. 13th Ed. 443, and the cases there cited.

Judgment for plaintiff.

REID V. McBEAN.

Mortgagee—Assignees.

Held, that assignee of a second mortgagee was entitled to prevail in ejectment against the mortgagor or his assignor. The legal estate being in third parties not affecting their rights.

EJECTMENT for south half of lot No. 11, broken concession

A, township of Hamilton, except one-eighth of an acre deeded for a school-house. Writ tested 23rd February, 1858. Defence for the whole.

The case was tried at Cobourg, in April last, before *Draper*, C. J. The plaintiff proved a mortgage dated the 30th of January, 1855, from Joseph H. Dean to John B. Armour, in fee, subject to a proviso for the payment of £400 in three years from this date, registered 30th of January, 1855, and an assignment of that mortgage to himself, dated the 22nd of February, 1858. He then called the defendant, who stated that he had a deed from Joseph H. Dean to himself of the premises, executed in November last, and claimed thereby to hold an equity of redemption since the date of that deed. That he had made an arrangement with the Trust and Loan company, who recognise him as holding the premises under them; that he entered into possession immediately after getting the deed from Dean. On the defence was proved a mortgage, dated the 7th of April, 1853, from Joseph H. Dean to the Trust and Loan Company, registered the 8th of April, 1853. Dean was then in possession of the premises. Mr Armour was made aware, by Dean or defendant, that this mortgage was in existence. About a month after getting the deed from Dean, the defendant gave his own bond to the Trust and Loan Company, as a further security, and obtained from them an extension of time for five years to pay off the mortgage made by Dean to them.

On these facts the learned judge directed a nonsuit. The legal estate appeared to be in the Trust and Loan Company, by whose assent and permission the defendant was in possession. But as the defendant was shewn to have taken a conveyance of Dean's interest, (though by what form of conveyance did not appear,) and therefore might be bound to admit the plaintiff's right to possession under the mortgage of the 30th of January, 1855, as against Dean, and therefore as against himself, he reserved leave to the plaintiff to move to enter a verdict for himself.

In Easter Term, *Armour* obtained a rule to enter a verdict for plaintiff on the leave reserved.

In Trinity Term, *D. B. Read* shewed cause. *Cameron*, Q. C., supported the rule.

DRAPER, C. J., delivered the judgment of the court.

The mortgage from Joseph H. Dean to the Trust and Loan Company has been produced by the defendant, as was required by the court when the rule *nisi* was moved, and during the argument. It contains nothing that would strengthen the defendant's case, the proviso was to pay £900 on the 11th of April, 1858, and until default Dean was to retain possession. There could have been no right of entry in the mortgagee (unless for non-payment of the interest, which was not asserted) at the time this action was brought.

The doubt on my mind at the trial was, whether the arrangement made between the defendant and the Trust and Loan Company was not equivalent to an action by the first mortgagee, and a new taking and holding under them by defendant. But my brothers are of opinion, and on consideration I agree with them, that we cannot so treat it. The possession in fact has never been changed, and Dean would not be allowed in the face of his own mortgage to Armour, to deny the latter's right to possession as between themselves, though Armour might *eo instanti*, be himself evicted by the Trust and Loan Company: the plaintiff is the assignee of Armour, the defendant the assignee of Dean, and they respectively stand in the same position that the assignor stood, each to the other.

We think therefore the rule must be made absolute.

BOYS V. SMITH.

The plaintiff owned a stock of goods and some furniture and shop fixtures at "B.," he sold out to one "S.," taking from him a chattel mortgage in security. S. continued to carry on business, bringing other goods into the store, till he became involved, and absconded. Upon an attachment being placed in the sheriff's hands, he seized all the property in the store.

Held, that the property could easily be distinguished, and that the sheriff was liable for trespass.

The declaration contained two counts. First, for taking away and converting to his own use certain goods and chattels of plaintiff. Second, stating the issue from the Court of Queen's Bench, of a writ of replevin, against one

Patrick Smith, for the unjust detaining of certain goods directed to plaintiff, averring that plaintiff was legally entitled to replevy those goods, and to try his right to the goods against Patrick Smith, and that the plaintiff delivered the writ to the sheriff, and was ready to give surety, &c.; yet defendant refused to enter bond and securities, or to replevy the goods.

Pleas—1st. Not guilty. 2nd. To first count, goods not plaintiff's. 3rd. To second count, traverse of plaintiff's willingness to give bond, &c. 4th. To second count, goods not within the defendant's bailiwick. Issues on all.

The case was tried at Simcoe, in April last, before *McLean*, J., the following facts appeared in evidence. On the 20th of October, 1856, Patrick A. Smith executed to plaintiff a chattel mortgage to secure £336, on all the goods, merchandize, and chattels, in the brick store on lot No. 1, north side Dunlop Street, Barrie, to be paid in three instalments; one in three, one in six, and one in nine months, with interest. The plaintiff had kept store, and sold out to Patrick Smith, and this mortgage was given to secure the purchase money, and a small shop account. Smith then had from £800 to £1000 worth of goods in the store. Smith then carried on business, selling to customers from his stock, and obtaining new goods from time to time. In July, 1857, the defendant took possession of the goods in the store; at which time it was sworn that Patrick Smith could not have disposed of more than £500 of the goods covered by the mortgage. The plaintiff sued out a writ of replevin, directed to defendant on the 3rd of July, 1857, directing defendant to replevy all the goods, &c., in the brick house, on lot No. 1, north side Dunlop Street, town of Barrie, and offered a bond and sureties to defendant; Smith had run away some days before this, having up to that time continued carrying on business in the shop. He paid £83 15s. on account of the debt secured by the chattel mortgage. It was understood that he might sell the goods mortgaged in the course of business. Some of them, it was sworn, were in the store when defendant took possession. The chattel mortgage was duly filed the 1st of November, 1856. The

whole of the goods and shop furniture remaining when Patrick Smith went away, were appraised at £1096 5s. 7d., of which certain articles of shop furniture, scales, step-ladders, show-glasses, &c., were valued at £11 5s., and the household furniture at £63 2s. 5d. Some of the hardware that had been in plaintiff's shop, was marked with his mark, and so were some dry goods. One witness, who had at one time owned plaintiff's shop, with goods in it which he had assigned to plaintiff, proved that he had seen the goods seized by defendant, and among them, he was of opinion, there were from £200 to £300 worth of goods which had belonged to the plaintiff. Patrick Smith's goods were seized on a writ of attachment, about the 6th of July, 1857. There was no inventory attached to the chattel mortgage. After the sheriff had seized, the plaintiff was called upon, at his instance, or that of the attaching creditor, to point out the goods claimed by him. This was never done, but the answer given was, that the plaintiff would hold the sheriff responsible.

The learned judge directed the jury that Patrick Smith's goods, being mixed in such a manner that they could not be distinguished between those which he had got from the plaintiff and those obtained from other parties, the sheriff would not be considered a trespasser in seizing the whole, and therefore the sheriff was entitled to a verdict on the first count. And as to the second count, he left it to the jury to say, whether a bond, with two sufficient sureties, was tendered by the plaintiff to the sheriff, without which the sheriff was not bound to execute the writ of replevin.

The jury gave a general verdict for the defendant.

In Easter Term, *M. C. Cameron* obtained a rule *nisi* for a new trial, objecting to the charge, as to the first count, as he contended the sheriff was a trespasser if he seized the plaintiff's goods, (selling them afterwards,) although the plaintiff did not point them out. The attachment only gave him a right to seize the goods of the absconding debtor.

In Michaelmas Term, the rule was supported by *McMichael*, citing *Bradley v. Copley*, 1 Com. B. 685.

M. C. Cameron and *Darcey Boulton* shewed cause, citing *Allen v. Thompson*, 12 Ex. 16; *Mayer v. Davidson*, 7 C. P. U. C. 521; and *Porter v. Huntiff*, 6 C. P. U. C. 335.

DRAPER, C. J., delivered the judgment of the court.

Upon the plea of not guilty, the plaintiff was in strictness entitled to a verdict, for it did not put in issue the plaintiff's property in the goods seized. The second plea, however, expressly denied the plaintiff's property in the goods. If the evidence went far enough to shew that the plaintiff had lost his right to the goods, admitting he once had the property in them, it would have entitled the defendant to a verdict on this plea. But it appears to me it fell very short of this. It is true if a man wrongfully mix his own money or goods with those of another person, so that the two become undistinguishable, he may lose all, for if it were otherwise, a man might be made a trespasser against his will by the taking of his own goods. In *Colevile v. Reeves*, however, Lord *Ellenborough* says, "If a man puts corn into my bag, in which there is before some corn, the whole is mine, because it is impossible to distinguish what was mine from what was his. But it is impossible that articles of furniture can be blended together so as to create the same difficulty." In that case the plaintiff sued the messenger under a commission of bankruptcy against one Grindly, for taking his goods, and the defence offered was, that it was concerted between plaintiff and Grindley for the fraudulent purpose of protecting his goods against his assignees and creditors, that plaintiff should send some goods to the house to be mixed with Grindley's, and that owing to this the defendant, the messenger, had ignorantly taken them. But Lord *Ellenborough* held the defendant might have discovered that they belonged to the plaintiff, and took them at his peril; that whatever fraud there might be in the case, the property was not diverted from the plaintiff, and the stratagem described was no defence on the general issue to an action at his suit for taking and converting the goods. The pleas of not guilty, and not possessed, combined to have the same operation as the plea of not guilty at that time, and therefore the language of this case is strictly applicable.

If therefore the evidence was proper under these pleas, it was, I think, insufficient to warrant a verdict for the defendant. First, it was not pretended that the admixture of the

goods, such as it appeared to have been, was fraudulent, or wrongful; next, it did not appear that any of the plaintiff's goods were of that character that an admixture, destroying their identity as it were, which made it impossible to distinguish them from similar goods of Patrick Smith, had taken place; and as to some of them there clearly was evidence that they were distinguishable. Some were articles of furniture, others had the plaintiff's mark on them, others were sworn to by a witness who professed to know them certainly. Under these circumstances, it appears to me, the sheriff took them at his peril, as much as the messenger did in *Coleville v. Reeves*.

During the argument I felt some doubt whether the evidence was properly admissible on the plea of not possessed, for it seemed as if the defence really rested on an admission that the goods claimed were plaintiff's property at the time of the seizure, and that it was insisted his refusal to point them out was treated as a waiver or abandonment of his right, as a matter *ex post facto*, by which he had lost the right of property. But on reflection, I think, the true question is whether the evidence shewed that the goods were plaintiff's. If so, he was entitled to recover. The chattel mortgage was not impeached in any way, in form or in substance, and was legally enough to make out that he was owner. The goods were taken out of Patrick Smith's possession, which possession was *primâ facie* evidence of ownership by him, but was displaced by the mortgage to the plaintiff. The evidence does not, in my opinion, impeach this right. As to amount, quantity, value, &c., all these are questions for the jury, but if the mortgage was proved, and evidence was given that the defendant took away and disposed of goods included in it, the plaintiff showed a right to recover something.

I think, therefore, there should be a new trial without costs.

Per Cur.—Rule absolute, without costs.

REGINA V. THE BISHOP OF HURON.

Crown survey—Patent—Uncertainty.

A patent was issued from the C. L. office, describing the land as "all that parcel or tract of land, being part of the town plot of London, on which the Episcopal Church of England now stands, and containing four acres and two-thirds of an acre or thereabouts, and also lot number twelve in concession C, and lot number thirteen in said concession of the township of London."

The grantee of the Crown had, prior to the issuing of the patent, fenced in more land than the above description covered, and subsequent to their so fencing it in, but prior to the issuing of the patent, a survey was made by instructions of the government, and a portion so fenced was appropriated to the widening the street. Upon an indictment found, and a verdict thereon for the Crown,

Held, that the grantee under the above description was not entitled to the land so fenced in, but that the survey subsequently made must prevail.

Hagarty, J., dissenting.

The facts of this case sufficiently appear in the judgment of the Chief Justice.

Harrison for the Crown, left the case to the court upon the evidence.

C. Robinson appeared for the defendant.

DRAPER, C. J.—The earliest act of the Crown directly referring to the grant of this piece of land is the order in council of the 15th of January, 1836, which applied generally to the erection of a number of rectories, that of London being among the number, and recommended that no time should be lost in authorising the Attorney-General to prepare the necessary instruments to secure to the incumbents named in the annexed schedules, and their successors, the lots of land there enumerated as having been respectively set apart for glebes.

On this order in council, a patent under the great seal of the Province of Upper Canada, issued on the 18th of January, 1836, granting, "All that parcel or tract of land, being part of the town plot of London, on which the Episcopal Church of England now stands, and containing four acres and two tenths or thereabouts, and also lot number twelve in concession C., and lot number thirteen in said concession of the township of London," as a glebe or endowment to be held appurtenant with the rectory.

There had been a survey of a portion of the town of London several years before, dividing it into lots with

convenient streets, &c. In 1835, the government directed a survey of an additional portion of the reservation for the town lying north and east of what had been already divided into lots. In consequence of verbal directions from Col. Talbot, with whom the surveyor was instructed to communicate, he laid out the streets in this new portion, two chains wide, in the former portion the streets were only one chain wide. The church block was fenced in and the church was built on it a year or so before this survey, on a verbal assurance that a grant would be made of land at that particular spot for the church. It was on the north side of North street, and the south-west angle of the fence was placed where it was assumed and believed that North street on its north side would intersect Richmond street. The fence was run parallel, or nearly so, to the south side of North street, and at the distance of one hundred feet therefrom. The evidence shews that this width of one hundred feet for North street had been suggested to the government, and that the parties who applied in 1833 or 1834, to have this land granted for the church supposed that suggestion would be adopted. But there is no official record of this suggestion having been under consideration, or that the government or any of its officers were made aware how the fence was placed, or that there was a fence until the survey was afterwards made. The lot fenced by them contained more than the quantity expressed in the patent, for the evidence shews that such quantity of land will still be included in the block, though North street is left two chains wide instead of one hundred feet. The surveyor ran North street of the full width of two chains to its intersection with Richmond street, placing the posts which marked the north side within the fence, which was then standing. This was done shortly before the date of the patent. He returned his plan of survey and field notes in March, 1836. They have been acted upon ever since by the government in granting other lots marked upon them, and the map or plan is treated as the original map or plan in the Crown Lands office, and so far as appears, there has been no official act of the government, except this acting upon the map, by which the survey

and plan has been recognized and adopted. That this would be sufficient as to all grants made after the return of the plan and report of the survey to the Crown Lands office, in conformity with the map, has been a recognized doctrine for years past. And if the government issued patents of lots, naming them by the number, and as situate on any given side of a street designated in such plan, without other description, the boundaries would be determined by reference to the map and the report of the survey.

Here, however, the grant preceded by a couple of months, or rather less, the return of the first actual survey to the office. The surveyor had no written instructions or projected plan of survey that can be found. He was ordered to lay out a tract of land so as to form an additional part of the town of London as it was then laid out, and was referred to Colonel Talbot for any particular instructions or directions. Generally speaking, the new survey corresponds with the old one. Church street, running north and south in the first survey, is continued in the new plan, only that it, as well as the other streets, are made double the width of the former streets. A school reserve and another large block of land, probably the market reserve, is left upon it, and the lots on the north side of North street are of the same size as those on the opposite side, except those which adjoin the wider streets running north and south. If Col. Talbot's directions to make the streets two chains wide are to be considered as equivalent to official instructions to the surveyor, they certainly preceded the grant of the church block, for the surveyor began his work under those directions on the 7th December, 1835, planted the posts on North street on the 12th of January following, and completed it and returned his map and report to the Crown Lands office in March, 1836.

Taking all the facts, together, I am of opinion that Col. Talbot's directions must be treated as instructions from the Surveyor-General's department, and that what the surveyor did in accordance therewith must be considered as done by the authority of the government. The only question then is, had the Crown precluded itself by any thing that had previously happened from directing the survey to be so made.

The evidence establishes that two years, or thereabouts, before this survey, the government had assented that the plot previously set apart and granted as a site for the church in the town of London, should be sold to defray the cost of the erection of the church on another site: in fact, as I understand, though not directly so stated, on the site now in question. An application seems to have been made to the government, after a verbal communication on the spot with the then Lieutenant-Governor, but no trace can be found in the public offices of this application, or of any order in council or other official action on this application. I have made personal search and enquiry as to this, but unsuccessfully. Acting on the faith of what had passed in 1834, the committee engaged in erecting the church fenced in the land, marking its southern boundary at the distance of one hundred feet from the south line of North street laid out in the first survey. In this state the surveyor found it. He paid no attention to the fence as forming the north boundary of North street, but acted on the direction given by Col. Talbot, placed his stakes north of the fence, and continued the street of the width of two chains. The quantity of land granted by the patent is to be found in the lot as so bounded; there is nothing, therefore, in fact which derogates from the intention expressed in the patent, and nothing to prevent the Crown so limiting the appropriation, except the previous conversation with the Lieutenant-Governor, which, according to the evidence, never touched on the question of boundary, nor would have had any legal effect, if it had, and the fact that the lot was fenced as already stated.

I think, first, that nothing which is proved before us precluded the government from making North street two chains wide. Second, that the direction given by Colonel Talbot, acted upon by the surveyor, and ultimately adopted by the government in treating his plan and report of survey, as the authorized survey of this part of the town of London, must be treated as an act of the proper department for the ordering the survey, and that as this act preceded the letters patent granting the lot, we must, under all the circumstances, refer to it as indicating that by the letters patent it was meant to

set apart and appropriate a block according to the survey then in progress upon a plan by which the streets were to be two chains wide. The northern limit of North street had at that time been marked on the ground by the surveyor.

There are but two external considerations, to one or other of which we can refer to assist in applying the language of the patent to give it effect, and prevent its being void for uncertainty. One is the fact that two years or so before the date of the patent, the committee for building the church, acting apparently upon the conversation with the Lieutenant-Governor, and depending on getting a grant, fenced in a piece of land around the church, which fence remained from the time of its erection unaltered in position. The other is, that two or three months before the date of the patent, the government employed a surveyor to lay out that portion of the town of London on which the church was erected. That he commenced this survey upon a plan, as to the width of streets, &c., virtually directed by them, and that during its progress, and six days after that portion of it in which the church block is situated was surveyed, the patent issued. That he completed his survey, running his lines and planting his stakes within the fence so put up, but leaving the church block of a size to contain all, and I believe a little more than the land ($4\frac{2}{10}$ acres) stated in the letters patent. That he returned a map and report of the survey, which has since been, and still is, the only official and recognised plan in the Crown Lands office.

I think it more reasonable to treat this as determining what was meant by the letters patent, because the government may well have used the description as applicable to a survey then actually in progress, in which the boundaries of that block would necessarily be marked, and the contents of which appear to have been estimated in relation to the assumed size of blocks of land laid out round about that part of, if not generally throughout, the town. To rely upon the other fact, is to assume the government meant to adopt an act of the parties applying for the grant, of which they are not shewn in any way or at any time to have had notice, and to which, except it be deduced from the words

of the patent, they never gave any official sanction. It is further to be observed, the application to *Sir John Colborne* had reference to an expected grant to some individuals to be named as trustees for the church, in like manner as a grant for a similar purpose had been made, in a portion of the town of London first surveyed. Before the grant the government determined to erect this rectory, and included the land, as a part of the endowment, in the letters patent which do erect the rectory and appropriate the lands to be held by the incumbent for the time being, as appurtenant to it.

It is scarcely necessary to observe that the length of possession cannot aid in construing the patent, nor would that have had any influence when it was sealed. The question is, highway or no, and that depends on the effect of the language used. In fact, we are only enquiring on this occasion where the north side of North street is.

In my opinion, judgment should be for the Crown.

HAGARTY, J.—After giving this case all the consideration in my power, I have not been able to arrive at any decision free from doubt. The patent appropriates “all that parcel or tract of land being part of the town plot of London, on which the Episcopal Church of England now stands, and containing $4\frac{2}{10}$ acres, or thereabouts.” This language is strangely loose and inaccurate, not creditable to those who might have been expected to use expressions somewhat more precise and intelligible in grants from the Crown under the seal of the province. I will assume, however, that it means the parcel, &c., on which the fabric of the church then stood of some known body of Christians. It appears from the evidence that this parcel was distinguished from the rest of the town plot of London at the date of the grant by being surrounded by a fence, which alone marked or distinguished it as a parcel or known tract of land in the town plot. I feel pressed by one or other result. Either this patent is void for uncertainty, as not identifying the land intended to be appropriated, or it set apart the parcel on which the church then stood, and which

for some time before that time, had been, rightfully or wrongfully, marked out and defined by a surrounding fence. I cannot see any other parcel or tract of land on which this patent could have operated when the great seal was affixed to it except the parcel on which the church then stood. And as I can hardly read it as confined to the ground actually occupied by the fabric, I feel drawn to the conclusion that the parcel appropriated was that which, prior to that date, had been fenced in, used and known as a piece or parcel somewhat of the size mentioned in the grant, "or thereabouts," occupied by or for the church.

But the questions may be rather viewed thus: the prosecutors assert that a part of the parcel then enclosed by a fence was, at the moment the patent issued, already marked out and dedicated as a public highway, and the evidence of this is sought in the fact that by the surveyor's notes it appears that in his work then in progress, he had, some days prior to the date of the patent, driven in his surveying posts, marking out the north line of North street actually within the fence. He did not return his work to the surveyor general's department for two or three months later.

There is great weight in the argument that the Crown must have made the grant, having regard to the manner in which directions had already been given for laying out the new part of the town of London in which the premises lay, and the quantity of land described in the patent will be answered by accepting the posts planted by Carroll within the fence as the southern boundary of the church block.

I feel the force of this, and yet I regret to say I cannot either furnish an answer satisfactory to myself or feel assured that I am right in yielding to its cogency. On the whole, I am constrained to say that I cannot think the right of the Crown so clearly established as to concur in giving judgment against the defendant.

RICHARDS, J., agreed with the Chief Justice.

Per Cur.—Judgment for the Crown.

EADES V. MCGREGOR.

Ejectment—Taxes—Sheriff's Sale.

In an action of ejectment brought to try the title to land, the court refused to disturb the verdict upon the ground of misdirection upon points not urged at the trial.

EJECTMENT for lot No. 11, west side Communication road, first concession of Harwich. Writ dated the 10th of March, 1858. Defence for the whole.

The plaintiff claims title under conveyance from the heir-at-law of Solomon Droullard, who was heir-at-law of Francis Droullard, the grantee of the Crown, and from the heir-at-law of Richard Droullard. The defendant's claim was as vendee of Alexander Chewitt, who was vendee of the sheriff of the Western District, on sale of the premises for arrears of taxes, and also by possession.

The case was tried at Chatham in April, 1858, before *Sir J. B. Robinson*, C. J. Another action was tried at the same assizes in which the plaintiff's proved the title, under which they also claim the right to these premises. There were several questions, some of them of apparent nicety, involved, but it is unnecessary to set that part of the case out, as the judgment of this court does not turn upon it. On the defence the deputy clerk of the peace produced the treasurer's return of lands in arrear for taxes up to the 30th of June, 1838. It included this lot No. 11, west of Communication road, and bore date 11th of January, 1841. The defendant also called the sheriff by whom this lot was sold for taxes, on the 13th of October, 1841, and he proved that he made the sale to Alexander Chewitt, Esq. His then deputy, but now successor in office, also proved the sale, for the sum of £4 12s. 2d., and that in 1842 he delivered the deed executed by the sheriff to Mr. Chewitt. The treasurer's book was also produced, shewing that the lot was returned by him as in arrear. It appeared, however, that in some of the indexes and documents, this lot, or sale thereof, is entered as No. 11, fourth concession of Harwich, by what a witness termed a palpable error, for that lot was never sold for taxes. It was further proved, that the defendant McGregor was long a client of Mr. McLean, of Chatham, and left with him

a sheriff's deed from the sheriff of the Western district, and the defendant claimed title under that deed. Mr. Duck proved that he drew the conveyance from Chewitt to the defendant, under Mr. McLean's instruction, and he had no doubt that the deed referred to this lot, which he knew well, for defendant lived on it. He also proved that in August, 1854, Mr. McLean's office was burnt, and all the papers in it were destroyed, and he had no doubt that the sheriff's deed to Chewitt was then burnt. It appears that until after the sale to Chewitt the lot was uncultivated, but then the defendant McGregor took possession of it.

The learned Chief Justice left this evidence to the jury as sufficiently proving a sale, and they found for the defendant.

In Easter Term, *A. Prince* obtained a rule *nisi* for a new trial on the law and evidence, and for misdirection in ruling there was sufficient evidence to go to the jury of the sale for taxes.

In Trinity Term, *C. Robinson* shewed cause. No objection to the sufficiency of the evidence of the sale for taxes was made at the trial, and no exception was taken to the charge. It is objected now for the first time, that the treasurer's signature was not attached to the return; but the statute does not render it necessary. It is true that the lot is not mentioned in all the papers produced relative to this liability and sale for taxes; but had this objection been taken at the trial it might have been explained. No evidence was given to shew the deed from the sheriff had not been registered. There is nothing in 6 Geo. IV. making registration indispensable to the validity of the sheriff's conveyance.

A. Prince, in support of his rule, complained that there was no proper opportunity at the trial of examining the documentary evidence, which was, as he stated, taken out of court by the defendant's attorney. And he argued that enough was not proved to support the sale for taxes, which should be strictly proved, being in the nature of a forfeiture.

DRAPER, C. J., delivered the judgment of the court.

Without entering into the particulars of the plaintiff's title, it may be observed, that the conveyance under which they claim from the heir-at-law (the grandson) of the original nomi-

nee of the Crown is of an exceedingly recent date, and gives rise to the idea that they have brought up a doubtful claim, which but for the 10th section of the statute of 1834, they could not maintain, for the heir of the patentee most probably had never entered, or supposed that he had any title, until offered a few hundred dollars for his supposed right to lands of which his grandfather was once seised.

Still he, and those claiming under him, have a right to assert their own title, and to take advantage of whatever defects there may be in the title of those who claim adversely to them, and if there be little sympathy felt for speculative purchasers, of neglected or forgotten claims, I do not know that the purchaser of two hundred acres of land for arrears of taxes, not amounting to \$20, can claim any thing more than what a careful attention to the provisions of the law will fairly entitle him to. Each party is asserting their strict legal rights.

But in such a case, if the jury have found a verdict which maintains the possession in those who have held it undisturbed for the last sixteen or seventeen years, the court would not in an ejectment, which concludes no right, grant a new trial, unless it was plain that the jury had disregarded the evidence, or in some other way had manifestly failed in the performance of their duty, or unless there had been some miscarriage in the way in which the case was submitted to them on the part of the court.

In the present instance the complaint is confined to an alleged misdirection. But it is not denied that no objection to the charge was made at the trial, and that the insufficiency of the evidence now relied upon was neither pointed out to the court nor urged to the jury. The objections relied upon are for the first time taken in banc, and without meaning to say that there may not a case arise in which the ends of justice may imperatively require that we should not fetter ourselves by to strictly adhering to the rule, that the court will not entertain objections to the charge which were not raised at the trial. I do not think this is a case in which we ought to deviate from it, and therefore in my opinion this rule should be discharged.

Per Cur.—Rule discharged.

CRAWFORD V. THE PROVINCIAL INSURANCE COMPANY.

Assignment of stock—Registration.

Held, that an assignment of stock in the Provincial Insurance Company, duly executed by assigner and assignee, for a good consideration, with proper notice to the company, is valid without further registration, provided the assigner is not indebted to the company and owes no calls. 22nd Vic., ch. 63, since in force.

S. Richards, in Hilary Term last, obtained a rule calling on the Provincial Insurance Company of Toronto to shew cause, on the first day of Easter Term, why a writ of *mandamus* should not issue against them, commanding and directing the said Company to enter and register in the register or transfer books of the Company, the assignment and transfer by Hammett Hill to the said Charles Crawford of fifty shares of the stock in the said Company (being the whole of said Hill's stock in said Company), which assignment bears date the 7th day of January, 1858, and to enter and register in the books of the said Company, and in every list of the shareholders thereof, the name of said Charles Crawford as proprietor of said fifty shares, on grounds disclosed in affidavits and papers filed.

The affidavits filed were, 1st, that of Hammett Hill (sworn 13th of January, 1858), that in August, 1857, he was owner of fifty shares of capital stock of the Provincial Insurance Company: that about the 22nd of August he duly executed an assignment to one Charles Crawford, and did thereby absolutely convey the said stock to him: that at the time of the transfer a call of 5 per cent., had been made on the stock, payable by instalments; one per cent. on the 1st of October, one per cent. on the 1st of November, one per cent. on the 1st of December, 1857, one per cent. on the 1st of January, and one per cent. on the 1st of February, 1858, with privilege to the stockholders to pay the whole in one sum any time after the 1st of October: that he has been informed and believes the officer of the Company refuses to register the assignment unless the call be paid, and deponent will give security for the payment of a further call of five per cent.: that about the 4th of October, 1857, he paid up in full the last call of 5 per cent., and that no call

or calls on the stock have been made other than those which have been fully paid and satisfied: that on or about the 7th of January, 1858, he transferred, by instrument under his hand and seal, the said fifty shares, to the said Charles Crawford, and that Crawford executed the assignment and thereby accepted thereof. 2nd. Affidavit of *S. Richards*, Esq., that under a power of attorney to himself and M. B. Jackson (annexed) he did, on the 16th of January, 1858, call at the office of the Provincial Insurance Company of Toronto, and saw William Hutton McCrea, cashier of said Company, and the clerk or officer of the Company having charge of their books in which transfers of stock in said company are registered, and having charge of the entry of such transfers, and tendered to him a duplicate of the assignment with an affidavit (copy annexed), and required him to register the same in the books: and offered to him to execute any assignment of the stock as attorney for Hill, and any acceptance thereof by Crawford that might be necessary; but McCrae refused to do any thing without the written consent of the President or Vice-President of the Company, and informed deponent that such were his instructions and the regulations of the Company: that on the same day deponent went to James Scott Howard, President of the said Company, and tendered him the duplicate assignment and affidavit, and requested him to direct the transfer to be entered, or to give his written consent thereto, which he refused: that on the same day he made a like application to the Hon. J. H. Cameron, the Vice-President, and he also refused: that he is informed and believes the Directors of the Company have ordered that no such transfer shall be made or recognised without the written consent of the President or Vice-President: that he left the duplicate assignment with M. B. Jackson: that when he offered the assignment to the President of the Company, he (the President) stated that the transfer would not be allowed unless security were given for 5 per cent. of the amount of the stock transferred, to meet future calls. 3rd. Affidavit of M. B. Jackson, that on the 30th of January he called at the place of business in Toronto, of the Company, and saw J. L. Starr,

the Manager of the Company, and requested him to enter the assignment above mentioned in the books of the Company, and to transfer the stock to Charles Crawford, which he declined: that he told deponent to address a letter to him if he wished any thing done in the matter: that he left the duplicate assignment and affidavit endorsed thereon with him: that on the 3rd of February, 1858, deponent addressed a letter to said Starr (copy annexed), referring to their previous interview, and requesting to know whether the Directors would complete the transfer, or allow it to be completed or no, and on the 5th of February received the (annexed) reply from said Starr, stating that the Board refused to give their assent to such transfer.

This rule was, in Easter Term, enlarged by the defendants' counsel to Trinity Term, and in that term

J. Duggan shewed cause. He urged that this was not a case for a *mandamus*. He cited *R. v. London Assurance Company*, 5 B. & A. 899, where the court refused a similar application, saying they were not aware of any instance of the granting a *mandamus* in such a case, and that the company, though a corporation, was a mere private partnership, while the writ of *mandamus* is confined to cases of a public nature. *Rex v. Proprietors of the Wilts and Berks Canal Navigation*, 3 A. & E. 477; vide *R. v. Bucknock Canal Navigation*, 3 A. & E. 217. He filed affidavits shewing that Charles Crawford was a man in extremely poor circumstances, living by daily labour, at times on charity; while Hammett Hill, the assignor to him, was a man of substance, and argued that it was manifest that the object of the transfer was to escape liability for future calls, which he said was a fraud on the Company and on other stockholders: that the assignment was without consideration—a nominal consideration of £20 expressed; but Crawford's circumstances were such that he could not have paid even that. He also filed a verified extract from the minutes of the Board of Directors of the 3rd of September, 1857: by which it appeared that “A letter from Mr. Hammett Hill, proposing to pay the call if transfer agreed to, was submitted, but the Board declined to accede to the pro-

posal, it appearing, in answer to the enquiries made, that the party to whom the assignment was intended to be made was not solvent." And a resolution of the Board of Directors, passed the 18th of June, 1857, "Whereas, there is reason to apprehend that certain shares of the proprietary stock of the Provincial Insurance Company of Toronto have been recently transferred by solvent holders thereof to persons of questionable solvency and doubtful responsibility. And, whereas, it would be prejudicial to the interests of the Company and unfair to the shareholders generally and to the insuring public, to permit any transfers of the stock aforesaid to persons of doubtful solvency. Be it therefore resolved and ordered by the Board of Directors of the said Company, that no assignments or transfer of any proprietary stock of this Company shall be permitted to take place or be valid, or of any effect whatever, unless the name of each intended purchaser or transferee, in each instance of intended transfer, is first submitted in writing to the President or Vice-President of the Company, and unless, also, the written consent to the intended transfer be first given by such President or Vice-President, under his hand." This resolution was made under the authority of their Act of Incorporation, 12 Vic., ch. 167, sec. 29, which enacts that the proprietary stock of the Company shall be transferable according to such rules as the Board of Directors shall make and establish, and no stockholder indebted to the Company shall be permitted to make a transfer or receive a dividend until such debt be paid, or security to be paid, to the satisfaction of the Directors, be given. The act of last session, ch. 62, 22 Vic., sec. 3, goes farther, for it prevents a transfer after any calls are made, until they are paid, and (unless the whole amount of the stock is paid up) unless made with the assent of the directors first obtained.

A. Wilson, Q. C.—The Directors had, under the 12 Vic., power to make rules that were reasonable respecting the transfer of shares, but had no power to prohibit such transfer—absolutely to prohibit. This resolution would affect a transfer, though the stock were paid up in full. The 18 Vic., ch. 213, was the statute regulating transfers of this

stock when the deed of assignment was executed by Hill. sec. 7 enacts that no transfer of stock of the proprietary branch shall be valid, unless all instalments due thereon shall have been first paid up. It adds a restriction to transferring stock. If the directors had the power contended for, it was unnecessary. The nature of a transfer was considered in *Brock v. Ruttan*, 1 C. P. U. C. 218. He contended the directors could not prevent a transfer, though they might refuse to enter it in their books ; but the act 12 Vic., ch. 167, does not require the transfer to be entered and registered in the books of the Company, which distinguishes this case from *Brock v. Ruttan*, where the act of incorporation contained such a provision. Here the transfer itself is left by the statute to be the act of the parties, but it is made according to the rules of the directors. The reason of their refusal shews an illegality. They do not make any additional call, but they require the transferring stockholder to give security for 5 per cent. to pay future calls. This they have no right to do.

DRAPER, C. J., delivered the judgment of the court.

I have no doubt this is a case in which a prerogative writ of *mandamus* may be granted. The case of *Norris v. The Irish Land Company*, 4 Jur. N. S. 235, shews this, and as all the authorities of modern date are collected there, it is unnecessary to cite them again.

Nor does it appear to me the statute of last session determines the question. The enactment that no transfer of the stock shall be valid and effectual for any purpose, unless made with the assent of the board of directors, cannot be retroactive, and avoid transfers made without such assent at a time when no law made it necessary. If they had done a wrong by refusing to register the transfer before the act was passed, the act does not cure it.

Before we grant a *mandamus*, however, we have to be satisfied that the Company are legally bound to do that which the applicant desires to compel them to do, that is, to enter or register in the register or transfer books of the Company, the assignment from Hammett Hill to the applicant.

The first enactment relative to these proprietary shares is the 12 Vic., ch. 167, sec. 29, which is in these words, "The proprietary stock of the said Company shall be assignable and transferable according to such rules as the board of directors shall make and establish, and no stockholder indebted to the Company shall be permitted to make a transfer or receive a dividend until such debt be paid, or security to be paid (meaning I presume for payment) to the satisfaction of the board of directors be given."

Sec. 11 gives the directors power to make by-laws touching the well ordering of the Company, and specifying a variety of subjects, but this transfer and assignment of shares is not noticed therein.

The 18 Vic., ch. 213, sec. 7, enacts, "That no transfer of stock of the proprietary branch *shall be valid*, unless all instalments due thereon shall have been first paid up."

A strict construction of this section would lead to the inference that the act of transfer might be complete in itself, requiring nothing to be done to make its execution operative, but that it would want validity to relieve the assignor of the shares, and to transfer such liability with the shares to the assignee, unless the condition of paying up all instalments were fulfilled.

The former section deprived the shareholder of the power to make a transfer while he was a debtor to the Company, which, under the 28th section of the first act, he might be for calls, as the Company are thereby authorised to sue for them.

I need not set out the terms of the 22 Vic., ch. 62, sec. 3, as I do not think they affect this case.

The statutes, therefore, do not make an entry or registration in any book or books necessary, in order to constitute a valid and effectual assignment. So far as I can see, if a properly drawn instrument be made and executed between assignor and assignee, and due and complete notice of it be given to the Company, which, for obvious reasons, will be necessary, the assignment will be operative *under the statutes*, provided the assignor be not indebted to the Company, or in arrears with respect to calls.

The directors may make and establish rules with reference to transfers, and if reasonable and within the legitimate scope of their authority, such rules must be observed.

But it is not shewn to us on this application that they have made any rule requiring the transfer to be entered or registered in their books, in order to its validity. I cannot say I have any doubt that such a rule would be reasonable, and that they might properly say that they will not register unless the deed of transfer duly proved, or an authenticated copy, and the execution of the original duly proved, is delivered into their office, with other conditions which might be found necessary, *ex. gr.*, that the transferee should enter into some engagement to pay future calls, &c., &c.

It is not necessary to say whether, if they had made such rules, and after the assignor and assignee had complied with them, but the Company refused to make the entry, because one of their own officers, the President or Vice-President, would not sign a consent, a *mandamus* would be granted on an application like the present. It may be that the court would hold that if all that depended on the assignor and assignee to do had been done, the transfer would be complete, unless it came within the operation of the last act.

The distinction between such an act of incorporation as this Company has, and that *ex. gr.* of the Bank of Upper Canada is obvious. There the statute says, "no assignment or transfer shall be valid and effectual unless it be made and registered in a book or books to be kept by the directors for that purpose." To compel such a registration, if wrongfully refused, a *mandamus* would well lie. But in the present case I do not perceive that it is sufficiently established that it is the duty of the Company to enter and register this transfer in any book.

I am therefore of opinion this rule must be discharged without costs.

Per Cur.—Rule discharged.

SHAW V. SHAW.

Devise—Possession—Statute of limitations.

W. S., by will, devised his estate thus, "I give and bequeath unto my well beloved wife, Ruth Shaw, the one-third of lots No. 2, in the 1st and 2nd concession of the Township of Camden. That is to say, the part on which the orchard stands, for the sole use and maintenance of her the said R. S. during her life. I also bequeath unto my three youngest sons, Absalom, James, and Uriah, the whole of the said lot No. 2, in the 1st and 2nd concession in the township of Camden, to be equally divided between them after the decease of their mother.

The plaintiff claimed one undivided third of the whole, as eldest brother and heir at law of Uriah.

Held, that Uriah's right of entry to the two-thirds, upon which there was no estate for life created and those claiming under him accrued upon his majority, and twenty years' uninterrupted possession by the defendants had barred that right, and therefore that the plaintiff was only entitled to succeed as to the undivided one-third of the orchard or centre third.

This was an ejectment brought on the 13th of March, 1858, to recover the one undivided third part of lot No. 2, 1st and 2nd concession of Camden, County of Kent. The plaintiff claimed, as the eldest surviving brother and heir at law of Uriah Shaw, who was devisee of William Shaw. The defendants admitted the plaintiff's right to recover the one undivided third part of that part of the lots in question known as the orchard, or centre third, but denied his title to the residue, and the other two thirds of the orchard or centre third, they claimed as tenants in common with Uriah Shaw, under the will of William Shaw, already referred to, and as to the residue of the said lots No. 2, 1st and 2nd concession, Camden, they claimed by twenty years' uninterrupted and actual possession.

The case was tried at Chatham in April, 1858, before the *Chief Justice* of Upper Canada. The will of William Shaw was produced under which both parties claimed. The parts material in this suit are the following: "I give and bequeath unto my well beloved wife, Ruth Shaw, the one-third of lots No. 2, in the 1st and 2nd concessions of the Township of Camden: that is to say, the part on which the orchard stands, for the sole use and maintenance of her the said Ruth Shaw during her life. I also bequeath unto my three youngest sons, Absalom, James, and Uriah Shaw, the whole of the said lots No. 2, in the 1st and 2nd concessions, in the Township of Camden, to be equally divided between

them after the decease of their mother, the said Ruth Shaw, or otherwise to be divided between them the said Absalom, James, and Uriah Shaw, accordingly as they become of age, remembering that the said Ruth Shaw is to possess the third, which has the orchard, till her death." This will bore date the 21st of March, 1822.

The testator died in the fall of that year (1822), leaving five sons, the two elder, Thomas and John, and the three sons the devisees above-named. Absalom was born in March, 1803, James in May, 1807, and Uriah in 1812. The plaintiff, the eldest surviving son of the testator, was born in July, 1794. Uriah died intestate and unmarried in October, 1848. Ruth Shaw survived her husband, the testator, and died in August, 1849. She occupied the centre third, or orchard part of the two lots until her death. Uriah lived with her, renting the place from her, and died upon it. About 1830 Absalom Shaw went into possession of the Western third part of these lots, and has remained in exclusive possession ever since. About the same time James Shaw went into possession of the eastern third part of these lots, and has remained in exclusive possession ever since. And since the widows' death the two defendants, James and Absalom, have had possession of the centre or orchard third. There was no proof of any agreement or arrangement under which Absalom and James respectively took possession of the western and eastern third parts. Though it seems to have been a tacit understanding that Uriah was to get the orchard third. But he was a minor when they took possession, not coming of age until the autumn of 1833. The plaintiff's right as heir-at-law to Uriah was admitted. A verdict was rendered upon these facts for the plaintiff by consent, subject to the opinion of the court as to whether the plaintiff was entitled to recover any, and what part. It was understood that if, in the opinion of the court, plaintiff failed in establishing his right to more than the defendants considered he had a right to, viz., the undivided third part of the orchard third, that he shall pay the defendants costs subsequent to the trial.

The case was argued by *C. Robinson*, for the plaintiff, and

by *Becher*, Q. C., for the defendants. For the plaintiff, it was objected that the defendants could not, under their notice of claim, set up the statute of limitations; and that at all events, until the death of the widow, Uriah or those claiming under him were not put to a right of entry. That the two defendants entered under the will into their respective third parts, claiming to take each his third in severalty, acting under their construction of the will, though mistaken as to the words "otherwise to be divided between them, the said Absalom, James and Uriah Shaw, according as they become of age."

For the defendants, it was answered, that the evidence rather negatived than established the existence of any notion of partition, of which, at all events, there was no legal proof. That the defendants cannot be assumed to have entered under the will, for that did not give either an exclusive right of entry into any particular portion of the land. They entered as asserting a right, exclusive of the others, for so it must be assumed on the evidence, and have had more than twenty years' exclusive possession as to the eastern and western third parts. And as to those portions, Uriah and those claiming under him, have been under no disability for more than twenty years before the action was brought.

DRAPER, C. J., delivered the judgment of the court.

The will gave these lots No. 2, 1st and 2nd concession of Camden to the testator's three sons, Absalom, James, and Uriah, as tenants in common, excepting that as to the centre or orchard third part, there was a preceding estate for life, given by the testator to his widow, and therefore as to that part neither of the sons, the devisees, would have any right of entry until her death. In the events which have happened, it is unimportant, if there was any room for doubt, to determine whether the devise to the sons was contingent on their severally attaining the age of twenty-one years.

As to the orchard third, I see nothing to prevent the surviving devisees of the remainder in fee, Absalom and James, entering into possession on the death of the widow in 1849, as tenants in common, each of an undivided third;

whatever may have been considered as the intention of Absalom and James in each severally occupying a third of the two lots, and the expectation that Uriah would take the remaining third. Such a partition was never, so far as the evidence shews, legally made. The partition could not have been effectually made by parol, and no deed of any sort for the purpose was ever executed, that we are informed of. *Johnson v. Wilson*, Willes 248.

The real property act of 1834, sec. 24, corresponding with the imperial statute, 3 & 4 Wm. IV., ch. 27, sec. 12, enacts "that the possession of one coparcener joint-tenant or tenant in common, who has possession either of the entirety or of more than his undivided share, shall not be deemed the possession of the others. This enactment operates back by relation, from the first commencement of the separate possession; consequently Uriah was put to his right of entry by Absalom's taking the entirety of one part, and James the entirety of another part, of these two lots, as to which parts there was no intermediate estate for life created. The statute began to run against him as soon as the disability of nonage was removed. He lived till 1848, and this action is brought in 1858, and clearly too late. *Culley v. Doe* (11 A. & E. 1008).

As to the centre or orchard third, neither of the defendants, nor Uriah, had any right of entry in respect of the devise of the remainder in fee until the termination of the widow's life estate. This event happened in 1849, after Uriah's death. The plaintiff's right as heir-at-law of Uriah to recover was expressly admitted, the plaintiff might have taken judgment for it, immediately on receipt of the notice of defence. But I see no legal ground upon which he can claim more, and am of opinion therefore that the verdict should stand for one undivided third part of the centre or orchard third of lot No. 2, in the 1st and 2nd concession of the township of Camden. By the understanding at the trial, he is bound to pay the defendant's costs of the argument.

I think it was not open to the plaintiff's counsel to take exception, if there was any foundation for it, to the defendant's right under his notice of claim to rely on the statute

of 1834. First of all, the notice on the record plainly asserts title by twenty years' possession, which is, in effect, asserting a title in the defendants under the statute, and not a mere bar to the plaintiff's remedy by action. And, next, this is brought before us as a special case, in which the parties place themselves on the judgment of the court upon an admitted state of facts, waiving thereby any objection to those facts being properly submitted for consideration. No such difficulty seems to have been suggested at *nisi prius*.

Per Cur.—*Postea* to plaintiff for one third part of the centre or orchard part. Plaintiff to pay defendant's costs of argument.

REGINA V. BECKWITH.

Evidence—Corroboration—Statute 20 Vic., ch. 61.

Held, that a conviction of a prisoner for horse-stealing upon the uncorroborated evidence of an accomplice was legal, although the judge did not caution the jury as to the weight to be attached to the evidence.

The prisoner was convicted of horse stealing at the last spring assizes for the County of Halton, before *McLean, J.*

The principal evidence against him was one William Chisholm, who, on his own shewing, was an accomplice. Without his testimony, there was nothing whatever to justify or sustain a conviction. There was no corroboration of this man's testimony except upon points which, however strongly fortified, did not directly tend to prove the prisoner's guilt, *i. e.*, his innocence was perfectly consistent with the statement on which the accomplice's testimony was corroborated. At the same time the evidence of William Chisholm was amply sufficient to warrant a conviction if he was believed. The corroborating facts as to the mode in which the horse was stolen, were, that the parties who committed the theft drove in a two-wheeled vehicle close to the place whence the horse was taken; that they separated after the theft was accomplished; that the horse was taken to a tavern where Chisholm swears he got him, and was disposed of as he swears. But all this might have happened if Chisholm him-

self had accompanied Thompson, the other party whom he accuses, instead of the prisoner. And if there was any proof that Thompson and the prisoner were out together on that night, the corroboration might well have been deemed sufficient. It would even have been material if it had been proved that Chisholm could not have been there, as in that case his apparent accuracy in describing the transaction could not well have existed, if he had not derived his information from one or other of the guilty parties. Then again, evidence was given impeaching his general character, while the evidence as to the prisoner's character was of a favorable tendency.

The learned judge told the jury "that an accomplice in a crime is at all times a competent witness on behalf of the Crown, and that a conviction on such testimony must be strictly legal; that if the witness is in law competent to give evidence, and does give evidence, shewing the guilt of a prisoner, he could not feel himself at liberty to tell a jury that they are not to pay any attention to it because it is uncorroborated by other testimony; that the evidence of an accomplice must stand upon the same footing as that of any other witness of bad character, and must be judged of according to its circumstances." The learned judge remarked that his testimony was corroborated in some particulars by two witnesses, "but that as to the fact of the prisoner being one of those by whom the horse was stolen, it is unsupported by any other testimony, and that being the case, the jury must decide upon it as to the guilt or innocence of the prisoner." The prisoner's counsel urged that the evidence of Chisholm being unsupported in the main fact on which the whole case must depend, the jury should be directed that the prisoner was entitled to an acquittal. This the learned judge declined to do, directing that if the jury had any reasonable doubt on the whole evidence, they should acquit the prisoner. The jury found him guilty. Sentence was deferred.

In Easter Term, *Eccles*, Q. C., obtained a rule *nisi* for a new trial on the grounds that the verdict was contrary to law and evidence, and for misdirection in charging the jury

that they might convict the prisoner upon the evidence of an accomplice without any evidence to corroborate or support it upon some material point. He also moved upon grounds disclosed upon affidavits: the court received them *de bene esse*, reserving for consideration whether they should be read.

In Trinity Term, *R. A. Harrison* shewed cause. He objected that the application was not made in conformity with the rules of court, promulgated on the last day of Hilary Term last. Rules Nos. 5, 6 and 7 were not complied with. As to the alleged misdirection, he urged that it was a matter of practice, not one of law, and therefore the objection failed, citing *Regina v. Stubbs*, 1 Jur. N. S. 1115; 7 Cox 48. But there was sufficient corroborative evidence, *Roscoe's Crim. Law*, 149. He contended the affidavits should not be received; but in case the court were of a contrary opinion, he filed affidavits in contradiction.

Hector Cameron supported the rule. He admitted the strict legality of a conviction even upon the unsupported evidence of an accomplice, but insisted that the jury should have been cautioned, and though the omission of this caution was no ground to arrest the judgment, it was ground to appeal to the court to exercise the discretion vested in them by the statute 20 Vic., ch. 61, to submit the case to another jury. He cited *Taylor* on evidence, secs. 23, 171, 887.

DRAPER., C. J., delivered the judgment of the court.

The 5th rule of Hilary Term last, requires that on an application for a new trial under this act (20 Vic., ch. 61) a copy of the indictment and subsequent pleadings, if any, and of the verdict indorsed upon the indictment, and a copy of any written instrument or writing on which the indictment is founded, the whole to be certified by the clerk of assize, or other officer having custody of the same, shall be filed in the court with the motion paper for a new trial. And the sixth rule requires that in every such case as is mentioned in the last preceding rule where the person convicted has been defended by counsel at the trial, a detailed statement of the evidence approved by the judge who tried the case

shall be furnished to the court of appeal by the defendant at the same time with the motion paper for a new trial.

Neither of these rules were complied with, and the court have been obliged, in order to understand the argument, to obtain from the learned judge before whom the prisoners were tried, a perusal of his notes of the evidence, and his direction to the jury. The preliminary objection is therefore fully sustained.

I have great doubts whether we should receive affidavits on a motion for a new trial under this statute. Sec. 1 enacts that any person convicted before, &c., may apply for a new trial to, &c., "*upon any point of law or question of fact* in as full and ample a manner as any person may now apply to such superior court for a new trial in a civil action. I understand the power or right to apply for a new trial to be restricted to points of law and questions of fact, arising upon the case as it appeared at the trial when the prisoner was convicted. If it had been intended to enable a prisoner to move for a new trial on any and every ground, upon which new trials in civil actions are allowed to be moved for, the introduction of the words upon any point of law or question of fact would be superfluous, for in such cases the practice of moving for a new trial in civil causes is well established. But the default or misconduct of witnesses in attending, or a mistake made by a witness on giving testimony, or the discovery of fresh evidence, can hardly be held to be "*a question of fact*," and certainly are not points of law. The discovery of witnesses who could contradict those examined at the trial appears to be no ground for setting aside the verdict in a civil case. *Dickinson v. Blake*, (7 Br. P. Ca. 177). The affidavits produced in the present case state that the deponents can contradict Chisholm on certain points sworn to at the trial. I do not find that it is explained why this evidence was not given at the trial, nor is it sworn that the prisoner was not aware of this testimony then; one of the deponents states that he was in court during the trial. If admitted, as in civil cases, they afford no ground for a new trial. But the strong leaning of my opinion is, that under the words of the statute,

affidavits are not admissible at all. We do not, however, decide this point.

As to the alleged misdirection,

In the *Queen v. Francis Stubbs*, the question was, whether the direction to the jury was right. Several persons were indicted there, accomplices gave evidence against them, and their evidence was corroborated in some particulars against all the accused except the prisoner. The jury were told it was not necessary the accomplices should be corroborated as to each individual prisoner being connected with the crime charged; that their being corroborated as to material facts tending to shew the others were connected with the robbery was sufficient as to the whole case, but that the jury should look with more suspicion at the evidence against this prisoner, where there was no corroboration, than with regard to the others, where there was; but that it was a question for them. *Jarvis*, C. J., said, "We cannot interfere, although the direction to the jury was contrary to the practice, and the result therefore is to be regretted. It is not a rule of law that an accomplice must be corroborated, but one of practice merely. It is usual for judges to tell the jury that they may act as they please upon the uncorroborated evidence of an accomplice, but that it is safer to require corroboration. In this case the jury have acted upon the evidence before them; but this is not a tribunal to which an appeal can be made in cases of this description."

Park, B., says, "It is competent to the jury to find prisoners guilty upon the unsupported evidence of an accomplice, but judges have always told jurors to require confirmation before they do so. I tell juries not to find the prisoner guilty unless the accomplice's evidence is confirmed not only as to facts, but as to identity."

But as the court of criminal appeal under the 11 & 12 Vic., ch. 78, from which our statute 14 & 15 Vic., ch. 13, is taken, have only jurisdiction to decide questions of law reserved—and this was not a question of law, but of practice—the conviction could not be quashed.

In *Taylor on Evidence*, sec. 23, it is said, "So, if the uncorroborated testimony of a single witness be insufficient

by law to establish guilt, as for instance in cases of treason or perjury, the judge must acquaint the jury with the nature and extent of this rule. And even where a conviction founded on such testimony would be strictly legal, as in the case of an accomplice becoming a witness for the Crown, the judge would not properly discharge his duty if he did not warn the jury against the damage of placing implicit reliance upon statements coming from such a suspicious character." And again, at sec. 171, "Some few general propositions in regard to matters of fact, and the weight of testimony, are now universally taken for granted in the administration of justice, and are sanctioned by the usage of the bench. Such, for instance, is the caution given to juries to regard with distrust the testimony of an accomplice, unless it be materially confirmed by other evidence. There is no rigid presumption of the common law against such testimony, yet, experience has shewn that it is little worthy of credit, and on this experience the usage is founded." And, lastly, at sec. 887, "The jury may, if they please, act upon the evidence of the accomplice even in a capital case, without any confirmation of his statement. It is true that judges, in their discretion, will advise a jury not to convict a prisoner upon the testimony of an accomplice alone, and without corroboration, and the practice of giving such advice is now so general that its omission would be deemed a neglect of duty on the part of the judge."

In *R. v. Jones*, *Lord Ellenborough* says, "Judges, in their discretion, will advise a jury not to believe an accomplice unless he is confirmed, or only in as far as he is confirmed; but if he is believed, his testimony is unquestionably sufficient to establish the facts to which he deposes. It is allowed that he is a competent witness, and the consequence is inevitable, that if credit is given to his evidence it requires no confirmation from another witness." This and many similar dicta are sufficient to shew that though the accomplice was uncorroborated, the prisoner is not entitled to an acquittal; though the case of *R. v. Noaks* would seem to bear out the argument of the prisoner's counsel. Still, on the whole, I think there has been a departure from that which the au-

thorities shew is a well settled practice as to the manner in which the testimony of an accomplice is left to the jury. Such a witness stands in a situation differing from one whose general character is shewn to be bad; he is immediately connected with the crime, the subject of enquiry, and has an obvious interest in obtaining the conviction of those whom he represents to have acted with him in committing it, and therefore, I think it to be regretted that there should be an omission to submit his evidence to the jury, coupled with a caution which the practice and authority of the most eminent judges in England recommend. But after the case of the Queen v. Stubbs, it cannot be treated as a point of law, and if not, then it is not a ground to apply for a new trial, for it certainly is not a question of fact.

I think therefore, the rule must be discharged.

Rule discharged.

See R. v. Morris, 7 C. & P. 270; R. v. Farler, 8 C. & P. 107; R. v. Dyke, 8 C. & P. 261; R. v. Birkett, 8 C. & P. 732; R. v. Noakes, 5 C. & P. 326; Rex v. Hastings, 7 C. & P. 152; R. v. Jones, 2 Camp. 132; R. v. Durham, 1 Leach 478; R. v. Atwood, 1 Leach 464; R. v. Barnard, 1 C. & P. 88; R. v. Wilkes, 7 C. & P. 273.

JARVIS V. THE GREAT WESTERN RAILWAY COMPANY.

Costs—Attorney.

Costs of suits being in all cases the money of the client,

Held, that an attorney taking an annual salary in lieu of such costs, was not entitled to tax more than disbursements (which, by his agreement, he was entitled to recover from his client) from the defendant in the action, notwithstanding that all such costs were the property of the attorney by the arrangement.

Jarvis, C. H., obtained a rule calling on the defendants to shew cause why the order of *McLean, J.*, made on the 4th of August last, discharging a summons granted on the 30th of the preceding month by the *Chief Justice* of this court, in which summons the defendants were required to shew cause why the master should not revise the taxation of costs in this action, in which the jury found a verdict for defendants, and the court discharged a rule *nisi*

for entering a verdict for plaintiff, upon leave reserved. The defendants thereupon entered their judgment and taxed their costs in the usual way.

The rule *nisi* was granted on the affidavits which had been used by the plaintiff in Chambers, and stated that the solicitor who should have attended the taxation of costs on the part of the plaintiff, did not get his instructions and the necessary papers until more than two hours after the time appointed for the taxation, which was accordingly taken *ex parte*. That many items are not (in the judgment of the deponent) properly taxable, because the defendants did not pay, and are not legally liable for, or chargeable with, the payment of the same. That (it is understood and believed) Emilius Irving, Esq., the defendants attorney, is their salaried servant, and is not entitled to any portion of the said costs.

It was further sworn, that prior to Mr. Irving being appointed attorney of the defendants, that situation was filled by Miles O'Reilly, Esq., and was paid by salary by the defendants for his services as their attorney and solicitor. The plaintiff swore that he was engaged in business with Mr. O'Reilly, while he was defendants' solicitor; that Mr. O'Reilly was paid by salary in lieu of costs in the various suits brought by and against the defendants, and for his services generally, and, "that in all cases in which the said defendants were successful, the costs incurred and recovered therein became and were the moneys and property of, and payable to, the defendants, and not of, or to, the said Miles O'Reilly." That he believes the terms upon which the said Emilius Irving holds the office of solicitor of the defendants are precisely similar to the terms upon which the said Miles O'Reilly held the same office, except as to the amount of such salary, the salary being in lieu of all costs and fees as aforesaid, but that the defendants seek unlawfully to realize a profit by the professional services of the said Emilius Irving.

In an affidavit of Plummer Dewar, who states that he was defendants' accountant while Mr. O'Reilly was their solicitor, and was also secretary of defendants' finance com-

mittee, it is sworn (after stating that Mr. O'Reilly was paid by a salary) that in all cases in which the Great Western Railway Company were successful, the costs incurred therein became, and were, their property, and payable to them, and that about the 21st of December, 1856, when deponent left their employ, the same arrangement with regard to the said *Æmilius Irving* was then in force.

And in an affidavit of James Hardy, who states he was head clerk in the accountant's office for the defendants, it is sworn, after setting forth that Mr. Irving was employed as defendants' solicitor at a salary, that in all suits brought by, or against, the defendants, in which costs were recovered, or in which the Great Western Railway Company were successful, such costs became the property of the said defendants, and not of Irving, and that his salary was in lieu of all costs, and that he believes Mr. Irving is now paid in the same manner, and is still the salaried servant of the defendants.

M. C. Cameron shewed cause. He filed two affidavits in addition to those filed on hearing the summons before *McLean, J.* Those so filed in Chambers were, 1st. Another affidavit of Plummer Dewar, stating that his first affidavit was made in consequence of the plaintiff informing him, that to avoid having to attend in court at Toronto under a subpœna, he had better give such evidence as he might recollect in the matter relating to the appointment of Messrs. Gwynne and Irving as solicitors of the Great Western Railway Company; that he has since been informed that his first affidavit was used for the purpose of reducing the costs taxed in this cause to the said attorney upon the ground that he is not entitled to them, and that they are not the property of the defendants; he therefore says that he is not aware of any arrangement entered into between the said Irving and the defendants, whereby the said costs should not be collected by Irving, and that his previous affidavit should be read with this explanation. That while he was accountant (up to the 31st of December, 1856) no money was paid by the attorneys of the Great Western Railway Company, as costs collected, unless it were disbursements that had been previously

advanced by the Company to such attorneys. 2nd. An affidavit made by Mr. Irving, almost the same as the one now filed.

The two affidavits now produced are, 1st. That of Charles John Brydges, Esq., who describes himself as managing director of the Great Western Railway Company. He swears that any costs which Mr. Irving may recover in any suit in which he is employed on behalf of the defendants against opposite parties are not received by defendants, nor applied in reduction of any sum paid by the defendants to Mr. Irving for his services to them. That such costs are wholly received by Mr. Irving for his proper benefit, except where defendants have advanced money for disbursements, which amounts he is required to refund when collected. That he (deponent) was present some months ago, when Mr. Irving, in conversation with Miles O'Reilly, Esq. explained to him the purport of this affidavit.

2nd. Mr. Irving's affidavit, which explicitly repeats the substance of Mr. Brydges's affidavit in relation to the terms of his employment by the Company, affirming that the fees and charges due and taxed to him as attorney or as counsel in suits by or against the Company are his own, and will not, under any circumstances, become the property of the defendants, nor do they benefit in consequence thereof in any way whatever, and that he is paid an annual sum by the defendants for services rendered to them in lieu of rendering bills of costs to them. He also swears that two or three months ago the plaintiff's attorney, Mr. O'Reilly, told him he would make an application to try his right to costs; that he (Mr. Irving) called Mr. Brydges to them and explained the conversation to him, and in both their presence asserted that these costs were his, which Mr. Brydges then confirmed, and indignantly denied the idea suggested by Mr. O'Reilly, that such costs were in any way funded or applied to the benefit of the defendants.

On these affidavits he insisted the case *primâ facie* made out by the plaintiff was fully met. He observed that the form of the application to rescind an order which was in effect a refusal to make any order, was objectionable, and

that if Mr. Justice *McLean's* order was rescinded, that would not entitle the plaintiff to a revision of costs, but he stated that he was instructed to meet the application on the merits, and to insist that the taxation was right.

A. Wilson, Q. C., and Anderson, contra. The costs in every judgment are awarded to the client, not to the attorney, whose claim is upon his client. If the client gets the whole amount of debt and costs on the judgment into his hands, the attorney would have to sue his client for work and labour, not for money had and received. An attorney for a pauper client can neither recover judgment for his client for costs, nor can he (the attorney) recover them from the opposite party, though the client succeeds in the suit. *Dooly v. Great Northern Railway Company*, 4 E & B. 341. In the present case, when the contract set forth in the affidavits filed for the defendants was once made, it enured for the benefit of all parties, plaintiffs or defendants, with whom the Great Western Railway Company have suits. The allowance of costs to a successful party is on the principal of re-imbursement. The defendant's attorney could not, in this case, claim the costs of defence from his client. If they had failed by reason of his contract with them, he never could have a right to tax costs as between attorney and client; having succeeded, his contract equally prevents this. There can be no room to apply the principle of re-imbursement as regards costs taxable between party and party, for the defendants were never liable to their attorney either for such costs or for costs between attorney and client. The contract destroys that right, and therefore prevents the application of the principle of re-imbursement. If the costs were recovered, how could the attorney, in the face of the agreement he had made with the defendants, have claimed a lien for them. *Hough v. Edwards*, 1 H. & N. 171.

DRAPER, C. J., delivered the judgment of the court.

If this case had depended merely on the question which was advanced and relied on when I granted the summons originally, viz., whether, under the circumstances, the defendants were seeking unlawfully to realise a profit by the

services of their attorney, I should have no difficulty in saying that the rule should be discharged, and that after the explanation which took place between Mr. Brydges, the managing director of the Great Western Railway Company, and the attorneys for the plaintiff and the defendants, that it never ought to have been moved. But the plaintiff's counsel have argued this matter very ably, and on higher grounds.

It seems to be settled, that if the client be not liable to pay costs to his attorney, he cannot have judgment to recover those costs against the opposite party.

Then, if the person acting as attorney for plaintiff or defendant be not duly qualified to practice, either from neglect to take out his certificate, or because of the want of some necessary step to make his admission regularly complete, he will have no right to recover costs against his client, and as a consequence, the client, unless he has made advances to carry on the suit, or would in some way sustain prejudice, cannot recover costs from the opposite party. *Reeder v. Bloom* (3 Bing 9), ——— *v. Sexton* (1 Dowl, 180) *Young v. Dowlman* (3 Y. & J. 24), *Meekin v. Whalley* (1 Bing. N. C. 59), and *Humphreys v. Harvey* (1 Bing. N. C. 62). The proceedings, however, are not irregular. *Smith v. Wilson*, (1 Dowl. 545), *Bailey v. Thompson* (2 Dowl. 655), *Hill v. Mills* (2 Dowl. 696) *Hilleary v. Hungate et al.* (3 Dowl. 56) *Punter v. Lord Grantley* (3 M. & Gr. 295).

So, if the plaintiff sues in *formâ pauperis*, and obtains a verdict, nothing is to be allowed in taxation of costs in respect of fees to the plaintiff's counsel, or by way of remuneration for the services of the plaintiff's attorney; and this is rested on the ground that the plaintiff, under the statute 11 H. VII., ch. 12, was not liable to pay them. *Dooly v. The Great Northern Railway Co.* 4 E. & B. 341.

The courts have recognised agreements between attorneys and their clients only to charge costs out of pocket under certain circumstances, or not to be paid unless successful, as binding on the attorney, and preventing his claiming more from his client; but I have not found in these cases any reference to the effect of such an agreement as to the rights of the opposite party in the suit.

The nature of the agreement was not that the attorney should bring the action and advance disbursements and not be repaid on any contingency, or only be repaid his advances, but that he should not have the claim against his client unless the suit succeeded. If successful, the client would be liable to him, and in such case there would be a right to tax costs against the opposite party. The contract not being prejudicial to the right of the third party is, as between the attorney and client, upheld. See *Re Stretton* (14 M. & W. 806), *Turner v. Tennant* (10 Jur. 429 *n.*), *Thwaites v. Mackereson* (3 C. & P. 341), *Drax v. Scroupe* (1 Dowl. 69), *In re. Masters* (4 Dowl. 18). Still, it is said in *Bac. Abr. Maintenance*, B. 5, "neither can an attorney lawfully carry on a cause for another at his own expense with a promise never to expect a re-payment." And in *Box v. Barnaby*, it is said, "if an attorney follow a cause to be paid a sum in gross it is champarty." *Hob.* 117.

The present case is, as to the nature of the agreement, unlike any of the cases that I have seen. As regards the Great Western Railway Company, the attorney has in fact agreed that in consideration of an annual salary he will bring or defend all suits and actions in which they are parties, without charge to them for his services in any such suit. Whether successful or unsuccessful, he is to deliver no bill of costs to them: to have no right to recover those costs against them except actual disbursements. In lieu thereof he is to recover, and has received, this annual salary, a gross sum, in discharge of their actual or contingent liability. This contract is strictly limited to remuneration for the attorney's professional services. It is not a contract of indemnity against costs, which parties succeeding in suits with them may recover, but it covers the whole ground of costs between attorney and client, and also the taxable costs between party and party, in cases wherein the Railway Company are successful. In all such cases the annual salary is a full compensation, and by the agreement is to bar the attorney from further claim against his own client. If the party who sues, or is sued by the Company, fails in his action or defence and turns out insolvent, the Company's

attorney cannot claim any of the costs of the suit from them, though, according to his statement of the agreement, he is entitled to those costs if he can recover them from the other party. It is further explained, and especially asserted on the part of the defendants, that they are not benefitted in any way whatever by costs being recovered in their behalf; that such costs are not received by them, nor is the amount applied in reduction or satisfaction of the salary payable to Mr. Irving, but that they belong solely and entirely to him.

Such an arrangement is well calculated to stimulate the exertions of the attorney, whose income must increase with every cause in which he succeeds for his clients, if the opposite parties are solvent, while he has the certainty of his salary to remunerate him for his time and labour if unsuccessful. To be sure, in this event, the Company have to pay the opposite party's costs, and still to pay the annual salary.

We cannot divide the year's salary rateably among all the suits brought or defended in the course of the year so as to fix a gross sum paid for each, nor would this be the intention of the parties, because no doubt the salary is designed to cover all professional services, not merely those rendered in suits brought or defended. Nor do I at present see that an agreement in consideration of an annual salary to advise a client, whenever required, to do all his conveyancing, or any other similar service, could on any ground be questioned. It can only be doubtful when relating to prosecuting or defending all suits and actions, the client may choose to undertake or defend.

It cannot make any difference whether such an arrangement be made by an attorney with a large corporation like these defendants, or with a bank, or a merchant in extensive business, or with a client bringing a single suit. (11 H. 7, ch. 12). The principle is the same, and if the doctrine in *Hobart*, *Vide 2 Marsh, R. 273*, *Guy v. Gower* be law, and it be champarty, (or rather maintenance) to follow a cause to be paid a sum in gross; I presume it will not be less maintenance to follow as many causes as a client may think fit to institute for a sum in gross, which an annual salary is

But it is not necessary to push the argument to that extent.

It is not denied that in this case the clients were not liable to their attorney, Mr. Irving, to pay him any bill in respect of the particular services rendered in this cause. If the plaintiff were unable to pay them, Mr. Irving could not recover them from the defendants. And it is unequivocally asserted that though, as between the defendants and their attorney, he has been paid for these services, yet the costs which the plaintiff is liable to pay do not belong to the defendants. They neither require them to recoup themselves for what they have paid their attorney, nor yet to enable them to pay him. Their agreement disentitles them to claim any right or control over them; treating them as the attorney's costs, he could maintain no action against his client for them, and that is made a test by *Tindal*, C. J., in *Humphreys v. Harvey* (1 Bing. N. C. 62).

The form of judgment shews that in law the costs are treated as belonging to the client; they are adjudged to him. An execution for them must be in his name. The statute 23 H. VIII., and 4 Jac. 1, gives them to defendants. If by his own agreement he has given up all claim to them, ought he to recover them? If what was suggested when the summons was originally moved, namely, that the defendants sought unlawfully to realize a profit out of the professional services of their attorney, were true, I suppose the taxation would be prevented; for it would in principle amount to allowing suits to be carried on in the name of an attorney for the profit of an uncertificated person. But the arrangement is, that the defendants are not to get any part of the costs, nor, as costs in the particular suit, to pay them to their attorney. Upon the best consideration I can give, I think the principle of re-imbursement must govern; and as the defendants have made such an arrangement as renders it impossible to apply any part of what they pay their attorney as a payment on account of the costs of this cause, they are only entitled to tax disbursements.

I have abstained from suggesting various abuses that might arise from such an arrangement as that stated in this case, where the attorney was unscrupulous in his proceedings, to multiply suits and to succeed *per fas aut nefas*, would be

his interest, while, if the client were of a litigious character, he might be induced to bring or defend actions which he might otherwise let alone. In the present case I have no doubt all has been done in a spirit of fairness and integrity, and only with a desire to do what was right both as regards the parties to the arrangement and others who might be more or less affected by it. The only imputation of unfairness has been fully and effectually met and repelled.

In my opinion the rule for a revision of taxation must be absolute; but under the circumstances, we do not think we should give costs.

Per Cur.—Rule absolute without costs.

WATKINS V. FENTON ET AL.

Pleading—Filing—Service.

Held, that the filing a plea without service of a copy is not a nullity, but an irregularity; and a judgment signed in such a case without a prior application to the court held irregular.

In Easter Term last *J. Duggan* obtained a rule calling on the defendant, William J. Fenton, to shew cause why the order of *Hagarty, J.*, which set aside the judgment in this cause, so far as related to the defendant, W. J. Fenton, should not be rescinded. It was granted as well upon the affidavits used in Chambers, as on others filed on moving the rule. The following were the facts in relation to the proceedings in question. The declaration was served on the attorney for the defendant Fenton, on the 21st of April previous. On the 28th of April, the defendant's attorney filed a plea for Fenton in the office of the deputy clerk of Crown at Brant, from which office the writ issued. On the 30th of April, the plaintiff's attorney signed judgment against Fenton. The action was brought on a promissory note drawn by Fenton and endorsed by the other defendant. On the 20th of April, 1858, judgment for want of an appearance was signed against defendant Gilbert, the writ having been specially endorsed; an appearance had been entered by an attorney for Fenton. The declaration and notice to plead were served on that attorney on the 21st

of April. On the 30th, as already stated, final judgment was signed for want of a plea by Fenton, and execution was issued on the 3rd of May. The plaintiff's attorney swore he had no notice of any plea until after final judgment was signed; that he was informed by his clerk that papers, which turned out to be pleas in this cause, were left at his office on the 3rd of May (Monday), in the morning, which he refused to accept, and soon afterwards they were taken away. The plaintiff's attorney, and another attorney who stated he had practised for five years in the County of Brant, swore it was their uniform practice to serve copies of pleas, and so far as they knew, it is the practice of every other attorney in that county.

In the following term, *M. C. Cameron* shewed cause. He referred to *McKâv v. McDearmid* (2 Chamb. Rep. I.), in which *Draper*, C. J., held that though filing a plea without serving a copy might be irregular for not complying with the rule of court then in force (Easter Term, 5 Vic., No. 4), yet that such irregularity did not entitle the plaintiff to sign judgment without application to the court or a judge.

J. Duggan referred to *Tyson v. McLean* (1 Pract. Rep. 339), in which it was decided by *Richards*, J., that filing a declaration without service of a copy on a defendant, a prisoner in custody, was not declaring within the meaning of the statute 12 Vic., ch. 63, sec. 24, or the rule No. 3, of Easter Term. He also referred to the C. L. P. Act, 1856, sec. 112, 122, and Harrison's notes thereon, and also to the rules of Trinity Term, 1856, Nos. 131, 133, and the notes, and to Archibald's Pr. 9th Edn. 258.

DRAPER, C. J., delivered the judgment of the court.

The 22nd sec. of C. L. P. Act, 1856, which relates to the commencement of, and proceedings in actions, where it is intended to hold the defendant to special bail, enacts that the plaintiff may, before the end of the term next after the arrest, declare against the defendant and proceed in the manner and according to the directions contained in the 3rd and 4th rules of our court of Easter Term, 5 Vic. No. 100 of the new rules is a transcript of No 3, and

No 132 of the new rules, of No. 4 of the rules of Easter Term, 5 Vic. As regards proceedings in bailable actions, these rules, No 3 & 4, form part of the statute, in effect, but only as regards such actions. As to all others, the new rules are to be regarded as regulating the practice.

The time for pleading is determined by sec. 102, which enacts (after doing away with certain formal rules) that a notice requiring the opposite party to declare, reply, rejoin, or otherwise, as the case may be, within eight days, otherwise judgment, shall be sufficient; and sec. 112, which also fixes eight days as the time for pleading in bar where the defendant is within the jurisdiction. The 103rd section makes filing necessary, for every declaration or pleading is to be dated of the day and year when it is *filed*. The statute says nothing as to service, except so far as service of copies is rendered necessary by sec. 22, which I have already observed relates only to proceedings where the defendant is held to bail. It is also material to observe that the English C. L. P. Act, 1852, sec 54, requires every declaration or pleading to be dated of the day when the same was *pleaded*, saying nothing about being *filed*.

Service of pleadings is rendered necessary by No. 132 of the new rules, and that rule clearly does render it necessary.

Weddle v. Brazier (1 C. & M. 69), and Eaden v. Roberts (9 Exch. 227), were cases relating to declarations which had been filed, but notice of the filing, calling on defendants to plead, had not been served. The court on motion of the defendant's counsel, set aside the declaration as *irregular*; the present case would be analogous if the applications were to set aside the plea for irregularity, but instead of this, the plaintiff assumed to treat the plea filed as a nullity. The distinction is obvious.

The cases of Worley v. Lee (2 T. R. 112), and of West v. Radford (3 Burr, 1452), were cited in one or both of the two foregoing cases; on examination, they will not be found to determine what the plaintiff here contends for, or to warrant any conclusion as to the objection taken in this case being sustainable on the ground that the non-service of a plea made the filing it nugatory. Nor does the case of

Hutchinson v. Brown (7 T. R. 298) go farther : it determined, "that according to the practice of this court, a declaration is only considered as being well delivered from the time of notice." According to the rule of court then in force of Trinity Term, 2 Geo. II., the plaintiff had signed judgment for want of a plea, because defendants' plea in abatement was not filed within four days from the filing of the declaration, but only within four days from the service of the notice, but the plea was filed before judgment signed, and the court set it aside.

It briefly comes to this : the statute renders filing a plea necessary. The rule of court superadds service. Both are necessary to make the plea regular. But it seems to me we are not warranted in saying the plea is a *nullity*, when filed as the statute requires. It is unquestionably *irregular*, and as such, *may* be set aside, and an application for this purpose seems to me more in analogy with the proceeding in Worley v. Lee, and Eaden v. Roberts, where, although the plaintiff had not complied with the rules of court as to declaring, but had, nevertheless, *filed* his declaration, the court were moved to set it aside for *irregularity*, and granted the application. I think the plaintiff should have pursued that course here, and the case of Davison v. Moreton (1 Chit. Rep. 715), though not directly in point, tends to support this conclusion ; and it is laid down in the older books of practice, that it was necessary to *search* for a plea before signing judgment.

Under our statute, 2 Geo. IV., ch. 1, sec. 5, filing a plea was enough, though they had not been served, and so far as our C. L. P. Act goes, it only requires filing. In this respect adhering to the older enactment.

I think it going too far to hold that a plea filed in accordance with the act, may be treated by the plaintiff as entirely nugatory, though I consider it may be set aside for want of service of a copy, as a declaration in England may be set aside for want of service of notice to plead, and of its being filed.

As to the inconvenience that may arise from not allowing a plaintiff to sign judgment as in this case, in throwing him over the assizes, I confess I do not think it a consideration

that can weigh in determining the question. The defendant who has omitted to serve his plea, will not, on motion to take it off the files, obtain any indulgence except on proper terms.

A somewhat remote analogy may be found in cases where proceedings have been carried on by an uncertificated attorney, who *ex. gr.* files a plea. It is not a nullity, though the attorney had no right to act in that capacity. I think the rule should be discharged.

Per Cur.—Rule discharged.

HYNDMAN V. WILLIAMS.

Lease—Re-entry—Legal estate.

Upon a lease purporting to be made by "R. W." as attorney for "A. H. E. H.," reserving a right of re-entry "by the said R. W. into the demised premises," not saying *as such attorney*—*Held*, that no right of entry was reserved, the court observing that "It is impossible to uphold the reservation of a right of re-entry to a stranger to the legal estate."

EJECTMENT for Nos. 2, 3, 4, and 5, on the east Lake road, in the township of Colborne, known as Sunderston, and for Nos. 9, 10, and 11, 8th concession Colborne, known as Spungoode, containing in the whole 800 acres. Defence by Rowland Williams for the whole. Judgment by default against Tutt. Writ issued 6th of March, 1858.

Plaintiff's notice of claim was as landlord against Williams, as tenant under a lease dated 10th November, 1854, for breach of covenant by Less. Defendant claimed title as tenant of Richard Williams, the assignee of the lessee of one Raby Williams, who derived title from the grantee of the Crown. The trial took place in May, 1858, at Godrich, before Sir *J. B. Robinson*, C. J. The lease of the 10th of November, 1854, was put in. It purported to be made between the plaintiff, executrix of the estate and effects of the late Henry Hyndman, by Raby Williams, her attorney, and defendant Williams, of the other part; whereby Raby Williams, as such attorney, demised, &c., the premises named in the declaration, containing 900 acres: *habendum*, for seven years from 15th of June, 1854, yielding and paying to Raby Williams, as such attorney, the sums, and per-

forming the covenants and agreements, upon the days and times respectively," and in manner *next year*, and after more particularly "mentioned." He, the said Williams, doth covenant with the said Raby Williams, as such attorney, the first year to pay the taxes and perform the necessary statute labour, without any charge for rent or otherwise; and for the residue of the term, unto the said Raby Williams, attorney as aforesaid, £12 10s. on the 15th of June in each year; that the tenant will till and cultivate the land in a husbandlike manner; and repair and keep in repair the houses, barns and fences, and shall not sell or cause to be sold or removed any cordwood, hemlock bark, or saw-logs, or use any wood on the land, except for necessary firewood and agricultural purposes, except that he may remove fallen timber: that if the tenant shall fail in the performance of the covenants and agreements above contained it shall be lawful for "the said Raby Williams into the demised premises" to re-enter, and the said tenant wholly to remove, and the same to re-possess and enjoy, as if the lease had never been made; and further, that the tenant will pay and perform all taxes, rates, and statute-labour, on or in respect of the premises, during the continuance of this lease. And Raby Williams for himself covenants for quiet enjoyment by the tenant, he paying his rent and performing his covenants. The lease was executed by the plaintiff by her attorney, Raby Williams, and by the tenant.

Clear evidence of breaches of several of the covenants was given, and a verdict was rendered for the plaintiff by direction of the learned *Chief Justice*, who expressed doubts, however, whether the right to re-enter being reserved to Raby Williams—not adding, as such attorney, or referring to the plaintiff—would enable the plaintiff to maintain this ejectment for breach of the covenants.

In Easter Term *Hector Cameron* obtained a rule *nisi* for a new trial, for misdirection on this point.

In Trinity Term *A. Richards* shewed cause, referring to Woodfalls, L. & T. 272; *Greenaway v. Hart*, 14 Com. B. 340; *Doe Thompson v. Arney*, 12 A. & E. 479; *Pistor v.*

Cater, 9 M. & W. 315 ; Doe Warner v. Browne, 8 Ea. 165 ; Doe Barker v. Goldsmith, 2 C. & J. 674 ; Frontin v. Small, 2 Lord Raymond, 1418.

Hector Cameron supported his rule, citing Platt on Leases, 318 ; Doe Spencer v. Godwin, 4 M. & S. 264.

DRAPER, C. J., delivered the judgment of the court.

It is impossible to uphold the reservation of a right of re-entry to a stranger to the legal estate.—Doe v. Lawrence, 4 Taunt. 23.—I should have felt inclined to go to the utmost verge that the authorities would warrant to treat this right of entry as ensuing for the benefit of the plaintiff, who was seised of the reversion ; but it is reserved to Raby Williams alone, omitting the description usually before given, “as such attorney,” and not adding “to her heirs or assigns.” I do not feel that we can treat this as any thing but a reservation of, or rather a proviso for, a re-entry by an absolute stranger to the title ; and therefore I think the rule must be absolute. I have rarely seen a more slovenly instrument purporting to be drawn by a conveyancer than this lease. The plaintiff may, however, have some remedy on the covenants, though no right to re-enter on the reserved power.

Whether the lease itself may not be wholly void it is for the plaintiff to consider. If it is thought advisable to go to trial again in order to raise this question, the plaintiff will have to amend her notice of claim.

Rule for new trial absolute.

Sherwood v. Oldknow, 3 M. & S. 382 ; Greenaway v. Hart, 14 C. B. 340 ; Doe Barker v. Lawrence, 4 Taunt 23 ; Co. Litt. 214 (a.) ; D’Abridgecourt v. Ashby, Mo. 118 ; Reynolds v. Kingman, Cro. El. 115 ; Gibby v. Copley ; 3 Liv. 140 ; Wilks v. Back, 2 East. 142 ; White v. Cugler, 6 T. R. 176-7 ; Barkely v. Hardy, 5 B. & C. 355 ; Gunefield v. Streck, 2 Dy 132 (a).

MCBRIDE V. GARDHAM.

Distress—Taxes—Municipal laws.

Held, that taxes collected during the year 1857, which were overdue since 1855, and charged in the assessment roll of 1857, by a resolution of the proper authorities to that effect on the 7th of December, 1857, after the expiration of the usual time (see 18 Vic., ch. 21, sec. 3) was valid and legal.

REPLEVIN against Gardham and Hazlehurst. Gardham avows and Hazlehurst acknowledges the taking, &c., because Gardham was the collector of taxes for the town of Brantford, and one Merigold (the proprietor and therefore in possession of certain premises on the north side of Colborne-street in the same town, of which plaintiff was at the said time, when, &c., in possession as tenant to Merigold) was rated on the collector's rolls for £51 15s., due by him in respect of his assessable property, for the town of Brantford, where he then and long before resided, and these taxes being in arrear, Gardham as collector, and Hazlehurst as his bailiff, proceeded to collect the taxes by distress and sale of the goods and chattels in and upon the said premises. To this avowry and cognizance the plaintiff pleads that Gardham as such collector had levied of the goods of Merigold as and for all taxes legally due on the said premises then in the occupation of plaintiff: that Gardham as such collector, should by law have returned his roll to the treasurer on or before the 1st of March, 1858, with an account of the taxes then remaining due on such roll: that Hazlehurst as bailiff, by virtue of a warrant dated the 16th of March, 1858, as follows,—“You are hereby commanded to levy and collect from Charles Merigold or property the sum of £10 13s. 9d., balance, being the amount of taxes due by the said Charles Merigold or property, for 1857, and also the costs and charges of this my warrant and the executing the same by distress and sale of the goods and chattels of the said Charles Merigold or property, and for your so doing this shall be your sufficient warrant or authority. And you are hereby required to certify to me, the collector of the town of Brantford, what you shall do by virtue of this my warrant. Dated,” &c., and signed and sealed by Gardham. That by virtue of the distress made of the goods of Merigold,

all the taxes due by him for the year 1857 were paid, and that the said sum of £10 13s. 9d. is included in the *said* sum of £52, the proceeds of the sale made under the distress, and that the goods in the declaration mentioned, distrained by the defendants, G. as collector, and H. as bailiff, were the goods of plaintiff, and not of Merigold. To this the defendants reply that the said taxes were due and unpaid and in arrear, and for the collection thereof the said goods and chattels were distrained in manner and form as in the cognizance and avowry. On which the plaintiff takes issue.

At the trial before the judge of the county court, it appeared that the defendant Gardham was collector of rates for the town of Brantford, for the years 1856-7-8. On the collector's roll Merigold was charged with £27 taxes for 1855, remaining unpaid when the roll for 1857 was delivered to the collector, which was charged on the roll of that year, together with £24 15s. taxes for the year 1857. The roll for 1855 was not shewn to have been returned. On the 7th of December, 1857, the town council of Brantford passed a resolution authorising Gardham to continue the collection of the taxes on the roll for 1857, after the expiration of the usual time. (See 18 Vic., ch. 21, sec. 3.) The taxes upon Merigold were for two properties—one on Colborne-street, the other on Dalhousie-street—which latter was charged with £4 10s. The taxes for the intermediate year 1856 were paid. On this evidence, and no other was given, the learned judge directed that Gardham had authority to collect, and the jury found in favour of the defendants.

The defendant applied for a new trial, before the judge of the County Court of Brant, and after argument the rule was discharged. From which decision he has appealed to this court on the following grounds :

1st. That the defendants had no right to levy a distress upon the goods and chattels of the plaintiff, the time therefor having expired by law.

2nd. That the resolution of the town council of the 7th of December, 1854, was bad, having been passed before the 14th of December.

3rd. That the collector was bound to return his roll to the treasurer on or before the 1st of March, 1858.

4th. That the warrant under which the defendants avow and justify is excessive and void in directing more taxes than were due to be levied upon the plaintiff.

5th. That the warrant of the 16th of March, 1858, directed to the defendant Hazlehurst, to levy of the goods and chattels of Charles Merigold or property, and the distress made thereunder is illegal, for levying upon the goods and chattels of the plaintiff.

6th. That the proceeds of the distress and sale of the goods and chattels of Charles Merigold should have been applied to the payment of the taxes due by him for the year 1857, instead of for the year 1855.

McBride, for plaintiff, cited *Newberry v. Stephens*, 16 Q. B. 65.

Freeman, Q. C., for defendant.

DRAPER, C. J., delivered the judgment of the court.

The only issue raised upon the avowry and the plea thereto is, whether the sum of £10 13s. 9d., which was levied by distress of the goods and chattels of the plaintiff, as a balance of taxes for 1857, was due or no. The plaintiff contends that it was not, because unless the collector had a right to apply what he had received from the sale of Merigold's goods in January, 1858, to the satisfaction of the taxes due by Merigold for the year 1855, the proceeds of that sale would have paid all the taxes due for the year 1857, upon the store and premises in Colborne-street, occupied by the plaintiff, or that at all events, the levy was too great by £4 10s., for there were £4 10s. taxes due in respect of other premises in Dalhousie-street, not occupied by plaintiff; and the plaintiff also complains that these taxes could not be levied out of his goods on the premises in Colborne-street. The whole amount of taxes due was £51, of this £40 6s. 3d. was levied of Merigold's goods. This would have over-paid all that was due for 1857, which was £27; of the remaining £24, £4 10s. was due on the premises in Dalhousie-street for 1857, leaving £19 10s. due for the taxes of 1855 on the store in Colborne-street, which I gather from the whole record and statement before us was not in plaintiff's occupation in 1855.

But the learned judge appears to have considered that the collector's warrant, under which the bailiff justifies, was sufficient. That the application of the proceeds of the sale of Merigold's own goods was in the collector's discretion, and that he might lawfully pay the taxes due for the year 1855 out of those proceeds, leaving the balance as due for taxes of 1857 on the store occupied by plaintiff during that year, and that if so, although the plaintiff was right as to the £4 10s. taxes due for 1857, the distress for the balance would be lawful; and the action was not for excessive distress, but a replevin which denied the right of distraining for any thing. And as to the other objections, of the time having expired within which the collector could act, the case of *Newberry v. Stephens*, 16 U. C. Q. B. 65, has decided them against plaintiff.

I think the appeal must be dismissed. The pleadings do not leave open several of the objections taken. The only issue is, whether the taxes distrained for were in arrear. The plaintiff does not deny that £6 3s. 9d. was due, but contends that the whole sum distrained, £10 13s. 9d., was not, and therefore he was entitled to succeed. I think the evidence shews all was due, for I think the collector had the right to appropriate the moneys he collected from Merigold to the payment of any of the taxes charged against Merigold on the roll, and it appears that the whole sums of £27 and £24 were so charged. The evidence therefore sustained the verdict, and the rule was properly discharged.

As I think none of the other objections taken are open to the plaintiff, I do not think it necessary to dispose of them.

Per Cur.—Appeal dismissed.

WOOD ET AL. V. ROSS ET AL.

Promissory note—Set-off—Consideration—Equitable defence.

Held, 1st—That a plea of set-off by the endorsees against the holder, was no defence either at law or equity, upon a promissory note given for the accommodation of the endorser.

2nd—That the endorsee of an overdue bill or note is liable to such equities only as attach to the bill or note itself, and to nothing collateral due from the endorser to the maker, or endorsee to payee.

3rd—That the endorsee (without value) is entitled to recover on a bill or note if any intermediate party is a holder for value.

DECLARATION on a promissory note made by defendants,

Taylor and Grant, payable to defendants, Ross, Mitchell, & Fiskin, for £589 6s. at six months from the 13th of April, 1857.

Plea on equitable grounds by all the defendants, that the note was endorsed by Ross, Mitchell, & Fiskin, to one Brett, and not direct to plaintiffs; that while Brett was holder, and before it became due, Brett became indebted to the defendants in an amount greater than the plaintiff's claim, for money due by Brett to defendants on a bill of exchange drawn at Toronto by one John Martin, then clerk to Brett, and accepted on the 4th of August, 1857, Wier, Cochran, & Co., by which bill Martin required the acceptors to pay to his order in London (England), £400, sixty days after sight, value received. And then Martin endorsed the bill to Brett, who endorsed the same to Overend, Gurney, & Co., who endorsed the same without recourse to defendants, which bill was presented for payment, and dishonoured. Notice to all parties, but they did not pay; and for money due by Brett to defendants on another bill of exchange drawn by Martin on, and accepted on the 4th of August, 1857, by Weir, Cochran, & Co., payable in London, for £600 sterling, eighty days after sight, to Martin's own order, and endorsed by him to Brett, who endorsed to Overend, Gurney, & Co., who endorsed the same without recourse to defendants, which second bill was presented for payment and dishonoured. Notice and non-payment as before. And for money due by Brett for exchange, re-exchange, &c., &c., in respect of the said two bills.

And defendants say, that the note (sued on) was made by Taylor & Grant, for the accommodation of Ross, Mitchell, and Fiskin, and without consideration. That the only consideration given by Brett for the said note was a bill of exchange drawn by him, or by Martin as his agent, and for the use of Brett, on Overend, Gurney, & Co., which bill O. G. & Co. refused to accept or pay, and did not accept and pay until the amounts of the said two bills of exchange first mentioned, whereof O. G. & Co. were then holders, were first paid to them by defendants, and in consideration of the said bills of exchange being paid to O. G. & Co. by defen-

dants, O. G. & Co. accepted the bill of exchange drawn on them by Brett or Martin. That Martin, during all that time, was, to the knowledge of Brett, under 21 years of age, and that Martin or Brett, and Weir, Cochran, & Co., were, and are, insolvent, and that defendants are without remedy except in this action. That the two bills first mentioned were made by Martin as agent, and at the request of Brett, to establish with Overend, Gurney, & Co., the credit on which O. G. & Co. should and did accept and pay the bill drawn by Brett or Martin. That while the two bills were current, and held by defendants, and before either became due, Brett became insolvent, and on the 31st of September, 1857, by *indenture*, assigned his estate, debts, notes, &c., to Taylor, Anderson, and Davis, including the note sued upon, as trustees, for the benefit of his creditors, which trustees then, as such, became holders of the note subject to the same equities, set-off, &c., as the same was originally held by Brett. That while the debt was due as aforesaid from Brett to defendants, the trustees in fraud of defendants, and in collusion with plaintiffs, and to deprive defendants of their right of set-off of the debt from Brett to them, of which debt and right of set-off the trustees and plaintiffs had notice, transferred the note to plaintiff, without consideration. That the trustees have ever since the assignment to them been, and still are, the beneficial holders of the note, and the plaintiffs sue as agents of the trustees, in pursuance of the said fraud, and that defendants are willing to set-off against the said note, the debt due by Brett to defendants.

To which the plaintiffs demur on the grounds,

1st. That the plaintiffs being shown to be the holders of the said note, a debt due by Brett to the defendants cannot be set-off against it.

2nd. That the debt due by Brett to the defendants did not constitute an equity attaching to the said note.

3rd. That the transfer of the said note in the manner by the said plea alleged, did not constitute any fraud on the defendants.

4th. That the defendants were not, by any thing in the said plea alleged, to pay the amount of the said two bills to

Overend, Gurney, & Co. That it does not appear that Overend, Gurney, & Co. had any right to accept bills drawn on them until the said two bills were paid by the defendants, or that they had not funds of the said Brett. But it does appear that the said Overend, Gurney, & Co. did accept and pay the bills drawn on them in consideration of a credit raised and established with them by the said bills.

5th. That it is not averred that the said Weir, Cochran, & Co. were insolvent at the time when the said two bills were indorsed to the defendants, or when they became due when the note sued on was transferred to the plaintiffs.

6th. That the trustees representing the creditors of Brett, and holding the note for them, and not for Brett, did not take or hold the same subject to any right of set-off against Brett.

7th. That no failure of consideration for the note sued on or other equity affecting it in the hands of the plaintiffs is alleged or shewn by the said plea.

S. C. Patterson, for plaintiff, cited *Oulds v. Harrison*, 10 Exch. 572; *Story on Equity, Jurisprudence*, 14, 34; *Isberg v. Bowden*, 8 Ex. 852.

McDonald for defendant, referred to *Story on Agency*, 404, 405, 407; *Cavendish v. Graves*, 3 Jurist, N. S., 1086; *Story on Equity, Juris*, 1435, 1436; *Wakefield v. Gorrie*, 5 U. C. Q. B. 160.

DRAPER, C. J., delivered the judgment of the court.

The defendants, two of whom are makers, and the others endorsers of the promissory note sued upon, join in the same plea on equitable grounds.

The substance of it is, that one Brett was the immediate indorsee of the defendants, who are the first indorsers and payees, though the plaintiffs do not notice him, but declare as the immediate endorsees of the payees; that the makers made the note for the accommodation of the payees, who endorsed and delivered it to Brett in consideration of a bill of exchange, drawn by him, or by one Martin at his instance, on Overend, Gurney, & Co., of London, who, at the time of the presentment of the bill to them for acceptance, were holders

for value of two other bills of exchange, drawn by Martin, on and accepted by Weir, Cochran & Co., payable to Martin's order, and endorsed by him to Brett, and by Brett to Overend, Gurney, & Co. That Overend, Gurney, & Co. would not accept the bill held by the defendants, Ross, Mitchell, & Fiskin, unless the other two bills accepted by Weir, Cochran & Co., were paid; whereupon, and to prevent the bill held by Ross, Mitchell, & Fiskin being protested, (R. M. & F.) took up the two bills which were endorsed to them by Overend, Gurney, & Co. without recourse. That these bills were not paid by Wier, Cochran & Co., wherefore Ross, Mitchell, & Fiskin were entitled to payment from Brett. That Brett, before the promissory note declared upon was due (according to the dates in the pleadings) assigned all his debts, bills, notes, and effects, to three trustees, who, in fraud of the defendants, and in collusion with the plaintiffs, and to deprive the defendants of their right to set-off of the debt so due by Brett to them (of which debt, and the right of set-off, the trustees and the plaintiffs had notice) transferred the note to the plaintiffs without consideration.

I do not understand the ground upon which the two defendants, who are the makers of the note, can set up this defence either at law or in equity. Although the provincial statute 3 Vic., ch. 8, allows the makers and endorsers of a promissory note to be sued in a joint action, it does not confound their several liabilities, or enable the one to avail himself of that which is exclusively the defence of the other. In this respect the parties are to be looked upon as if they were sued in separate actions, except so far as the 3rd act applies, which enacts, that in any such actions, the person sued shall be entitled to set off against the plaintiff, any payment, claim, or demand, whether joint or several, which, in its nature or circumstances, arises out of, or is in connexion with, the bill or promissory note, which is the subject of such joint action, or the consideration thereof in the same manner and to the same extent as though such defendant had been sued in the form heretofore used, and if the jury shall allow any demand as a set-off, and still find a balance in favour of the plaintiff, they shall state in the verdict what they

allow to each defendant as a set-off against the plaintiff's demand.

Payment, release, or any other matter which discharges all right of action on the bill or note, is a defence to each party. Set-off may arise between an endorser and a holder, to which another endorser or the acceptor or drawer of a bill, or the maker of a note, may be an entire stranger; and it seems to have been thought necessary to provide against the complication and confusion that the right of set-off might possibly create, by conferring (as I read the act) the right of set-off in an action brought under the statute to matters arising out of, or connected with, the bill or note which is the subject of the joint action.

Then, either the makers of the note are strangers to the set-off claimed by the other defendants, the indorsees, and can have no right to avail themselves of it; or on the true construction of the act, the set-off claimed, not arising out of, or being connected with, the note, which is the subject of this joint action, it is not an admissible plea for any of the defendants, an opinion to which I strongly incline, though I should be sorry to dispose of the case altogether on that ground, as it was not touched upon by the learned counsel on either side.

If this action were brought by Brett himself, and the defendants' counsel have strenuously urged that it should be viewed in that light, then, as between him and the three defendants who endorsed to him, the set-off claimed would be the subject of a plea at law. Brett, as plaintiff, would claim against these three defendants the amount of a note endorsed by them to him, which the maker had not paid. They would admit his claim, but set up another against him upon two bills of exchange endorsed by him, and of which they were holders, and which were dishonoured by the acceptors. These facts would constitute, if proved, a defence at law, not an equitable defence.

But to make it a plea on equitable grounds, other facts are added. These are, that the plaintiffs were makers for the accommodation of Ross, Mitchell, & Fiskin, though perhaps this is not relied upon for this purpose. 2nd—that Brett

assigned the note with his other effects, to trustees for the benefit of his creditors. 3rd.—That these trustees became the holders in the same manner, and subject to the same equities, set-off, and defences, on, and under which the same was originally held by Brett. 4th.—That these trustees assigned to the plaintiffs in collusion with them, and in fraud of the defendants. 5th.—That the plaintiffs paid no consideration.

I pass over the first and second grounds without remark. As to the third, it is to be observed, that at the time of the transfer to the trustees, the note was not due. It cannot stand on lower ground that if it had been overdue. The cases of Burrough and Moss, and Whitehead v. Walker (10 B. & C. 558 ; 10 M. & W. 698) answer the objection, for they decide that the indorsee of an overdue bill or note is liable to such equities only as attach on the bill or note itself, and not to a set-off in respect of a distinct debt due from the indorsee to the maker, or from the indorsee to the payee arising out of collateral matter. Isberg v. Bowden (8 Exch. 851) is also an important case on the same subject as enunciating this principle ; that the statutes of set-off are confined to legal debts between the parties, *their sole object being to prevent cross-actions between the same parties.*

As to the 4th & 5th, I quote the language of *Park, B.*, in *Oulds v. Harrison* (10 Exch. 579). “Though the plaintiff gave no value, the bill by the indorsement is transferred to him, and he has a right to sue on the bill if any intermediate party is a holder for value. There is therefore no defect in the title on that account.”

The only question then is, does the supposed fraud vitiate it, and in what way ? Is it really a fraud, though called so ? We think it is no fraud. The holder is under no legal obligation to allow the debt to be set off against the claim on the bill unless he has entered into a contract to that effect with the defendant, which contract would create an equity in favour of the defendant, attaching to an overdue bill. His power to circulate it is not restrained simply by the existence at the time of a debt of equal value, and his circulating it is, therefore, no infringement of any existing right

of the defendant. It is wholly contingent upon whether the defendant will have a debt due to him from the plaintiff when the bill is sued upon, and if there be, whether the defendant will choose to plead a set-off. Till then, the whole amount of the bill is due to the plaintiff, and if he endorse over the bill, though he must have known that the contingent right of set-off would be defeated, he clearly would give a good title. Does it become a fraud and defeat the title, if he actually intends to do by endorsing it, what, under the circumstances, would be the necessary result of that act, and would it become so if he communicates that intention to the endorsee, and the latter agreed to assist him. This, we think, is no fraud, and does not avoid the transaction. If it was a fraud, what would the consequence be? The transfer would be valid between the parties, and void only as against the party intended to be defrauded. *That would not enable the defendant to set off against the plaintiff the debt due from another*, for it would be against the words of the statute, which apply only to mutual debts between the defendant and the plaintiff."

It may be said that the cases referred to are all decisions at law. That is so: but they are decisions construing the statutes of set-off, and there cannot be two different constructions, both correct, of a statute in courts of law and of equity. No contrary construction has been given, at least that I am aware of, in any Chancery decision.

It should not be overlooked, that by a plea of set-off, the plaintiff's title is in effect admitted. The defence is not that the transfer to him is by reason of the alleged fraud, inoperative and void, but that notwithstanding the transfer, the defendants have a right to set off a debt due to them by a previous holder.

I think the plea clearly bad as regards the makers of the note, whether this will vitiate it altogether or no, it is not necessary to decide, because I also think it bad, on the grounds stated, as to the payees. It was not suggested that as regarded them it might be upheld as containing a legal, if not an equitable defence. I think it contains neither.

In my opinion, the plaintiffs are entitled to judgment.

WIGLE V. MERRICK ET AL.

Tenancy by curtesy—Reversion—Surrender—Seisin.

Held, that the husband of a deceased wife cannot be tenant by the curtesy except of lands of which his wife was seized of such an estate as that her issue by him would inherit, as heir to her, and

That as between the reversioner and tenant by the curtesy, a conveyance from the tenant by the curtesy operates as a surrender of the life estate, and that the freehold in law vests in the assignee before entry. And the lesser estate would, by operation of law as between them, merge in the greater, and the assignee's right of enjoyment would be immediate, as if the tenant for life had died.

RICHARDS, J., dissenting.

EJECTMENT to recover 62 $\frac{3}{4}$ acres of lot No. 4 in 1st concession of the township of Howard, which plaintiff claimed as the assignee of Joseph Wigle, who was the husband of Euphemia Wigle, deceased, (and surviving her,) said Euphemia being one of the sisters and co-heiresses of James Miller, deceased, who was the original grantee of the crown, he also claimed as heir-at-law of Euphemia.

The case was brought down for trial at the assizes for the county of Kent, held at Chatham, in the spring of 1857, before *Richards, J.* A verdict was entered for defendants, subject to the opinion of the court, the learned judge reserving leave to plaintiff to move to enter a verdict for himself if, under the facts found and proven, the court should consider him entitled to recover on any of the grounds taken at the trial.

The facts as proved at the trial appear to be these :

The lot in question, containing 313 acres more or less, was granted to James Miller on the 25th November, 1803 : he was born in 1784, and died seised in 1805. He died intestate and without issue, leaving four sisters :

1st. Polly or Mary Miller, his eldest sister, born the 20th of April, 1787, who married Coleman Roe in 1815, and she died about 22 or 23 years since.

2nd. Jane Miller, born the 8th September, 1789, who married one Barker about 30 years ago.

3rd. Euphemia Miller, born the 8th September, 1789, (Jane and Euphemia being twins) married in 1808 to *Joseph Wigle*, and died 4 or 5 years since.

4th. Rachel Miller, born the 6th March, 1792, who was married in 1816 or 1817 to Joseph Cady, and died 10 or 12 years since.

On the 14th of August, 1817, Joseph Cady and Rachel Cady his wife, (sister and one of the heiresses of James Miller deceased,) in consideration of £100, bargained, sold and conveyed to Christopher Arnold in fee, two-fifth parts of lot No 4, in the front concession of the township of Howard, which said 80 acres of land, or two-fifth parts, are butted and bounded as follows: commencing upon the river Thames at the north-east angle of one-fifth part of the said lot owned by William McCrea, Esquire; then south, forty-five degrees east, 70 chains more or less, to the concession line; then north, 4 degrees east, 12 chains; thence north, forty-five degrees west, to the river Thames; then southerly and westerly, following the several courses of the river with the stream, to the place of beginning.

On the 16th of August, Rachel Cady appeared before the late Chief Justice Campbell, then a puisne judge at Pain Creek in the Western District, and gave her consent to part with her estate in the land, and a certificate that such consent was voluntary was endorsed on the deed. This deed was registered in the registry office of the county of Kent on the 23rd of January, 1818.

On the 28th of March, 1821, Coleman Roe and Mary Roe, Jane Miller, Joseph Wigle and Effy Wigle, Joseph Cady and Rachel Cady, in consideration of £5, granted, bargained, sold, released and confirmed to Francis Jones in fee, all that messuage or tenement, being one equal fifth part of lot No. 4 in the front concession of Howard. On the 15th of September, 1821, before the then Chief Justice Powell on circuit, appeared Euphemia Wigle, and gave her consent to depart with her estate in the lands, and a certificate that she appeared to do so freely and voluntarily was signed by the Chief Justice. There is under this certificate another, signed also by Chief Justice Powell as follows: "The within named Mary Roe and Jane Miller made the above acknowledgment respecting their free consent, without coercion, to depart from their interest in the land conveyed. At Amherstburgh, this twentieth day of August, 1821.

(Signed,) WILLIAM DUMMER POWELL, C. J."

This deed was registered in the registry office of the county of Kent on the 6th of May, 1834.

On the 24th of January, 1822, Francis Jones, in consideration of £50, conveyed in fee to Christopher Arnold, "all that messuage or tenement of land, being one fifth part of lot No. 4 in the first concession of Howard, fronting on the river Thames. This deed was also registered on the 7th of May, 1834, in the registry office of the county of Kent.

Plaintiff was the eldest son and heir-at-law of Euphemia Wigle, who died in the fall of 1850 or 1851. The father of plaintiff released to him his right as the tenant by the curtesy or by any other right to the land before the commencement of the suit.

It was shewn that Cady and the father of the present plaintiff agreed to exchange the rights of their respective wives to the land in question for Wigle's wife's right thereto. Cady was to assign his wife's right to a lot in Gisfield, and pay in addition the sum of \$100. On the faith of this agreement Cady conveyed his own wife's as well as Wigle's wife's right to the said land to one Arnold. And on demanding from Wigle a conveyance of the land as agreed upon, was refused it except on payment in cash of \$100. Cady being thus disappointed in obtaining the conveyance, and fearing he would get into trouble about it, he absconded, and never got an assignment of Mrs. Wigle's share. Mr. Roe, who married the elder sister, stated that the lot had been divided into five shares amongst the four sisters and a half brother named Francis Jones. It did not appear at the trial that there was any partition by deed or instrument in writing, further than the conveyance to Jones referred to, but after that they claimed each to hold a fifth in severalty. After Cady had absconded, in 1820, plaintiff's father went to Arnold and explained the circumstances, and stated that Cady had no right to sell his wife's share, and offered to sell it to Arnold; the latter said he had bought it twice and paid for it, and would not buy it again. Wigle said he would have to give it up; Arnold said "If I have to I will have to," and did not seem disposed to leave.

The case was left to the jury upon the point of possession, and they found that defendants and those under whom they

claim had been in possession since 1828. They further found that from 1809 to 1817, Arnold, under whom defendants claim, was not in possession, but that he was from 1817 to 1828.

In Easter Term, 1858, the case was argued by *Becher*, Q. C., for plaintiff, and *Albert Prince* for defendants.

Becher contended that plaintiff must recover as to the wild land, as the statute could not run against him, as to that it not being in the actual inclosure and possession of the defendants and those under whom they claim. He referred to *Doe Hill v. Gander*, 1 U. C. Q. B. Reports 3. That the conveyance by the co-heiresses and their husbands to Jones was void for uncertainty, being for a fifth part, and it not being certain as to what particular fifth is intended. That the deed by Mrs. Wigle does not appear from the certificate to have been executed jointly with her husband. He also referred to *Doe Corbyn v. Beamston*, 3 A. & E. 63; *McDonald v. Twigg*, 5 U. C. 167; *Crabbe's Law of Real Property*, secs. 2300, 2229; *Coke Lyttleton's Cap. Coparceners*, 263, 4; *McKinnon v. Arnold*, 5 U. C. 604; *Doe v. Holtom*, 4 A. & E. 81.

A. Prince, for defendants. The right of Mrs. Wigle accrued in 1805, and although she was then under 21 years of age, yet her subsequent marriage made no difference, as there could not be a succession of disabilities, and she and those under whom she claimed could only bring their action within 20 years after the right accrued, and 10 years after the first disability was removed. That at all events it is more than 40 years since the right of entry accrued, and plaintiff is bound by the statute. That the conveyance to Jones is a transfer of the undivided one-fifth of the lot, the words being, "one equal fifth part of lot No. 4," and is consequently good. That the certificate on the deed is sufficient, the statute not requiring that the judge should certify that the deed was executed jointly with the husband. The deed on the face of it appears to be so executed, and will therefore be presumed to be good until the contrary is shewn. He referred to *Alison v. Rednor*, 14 U. C. 459; *Jackson v. Robertson*, 4 U. C. C. P. 272; *Ingals v. Ar-*

nold, 14 U. C. Q. B. 296; Buchner v. Buchner, 6 U. C. C. P. 314.

Becher, Q. C., contra. As to the action not being brought in time, no possession was shewn to have been in defendants or those under whom they claim until 1817, and after Mrs. Wigle's marriage, and consequently there was no succession of disabilities, nor was the disability as to coverture ever removed, she dying before her husband.

Hagarty J., and *Richards*, J., in the absence of the *Chief Justice*, not being able to agree, the case was again argued in Hilary Term last by *Becher*, Q. C., for plaintiff and *Albert Prince* for defendants, before the full court.

The following cases, in addition to those cited on the first argument, were referred to: *Bright v. Walker*, 1 C. M. & R. 212; *Stuart v. Spence*, 10 U. C. 486; *Bissett on Estates*, 44; *Crabbe's Law of Real Property*, sec. 2294, 2334; *Lyttleton*, 263-4; *Fiker v. Gordon*, 17 Bevan, 433; *Scott v. Scott*, 4 House of Lord's cases, 1065; *Cooper v. Emery*, 1 Philip's Chancery Rep. 388; *Rempson v. Pitchers*, 13 Simon's, 327; *Fulton v. Creagh*, 3 Jones & Latouch, 329.

DRAPER, C. J.—As the writ is framed the plaintiff claims part of lot No. 4, first concession of Howard, containing sixty-two and a-half acres of land, specially described by metes and bounds, according to which the land claimed was bounded on one side by land, now or formerly owned by one Christopher Arnold, on the other, by lands belonging to one John Williams, in front by the river Thames, and in rear by the allowance for road between the first and second concessions.

The facts are simple. The crown by letters patent, dated 25th of November, 1803, granted the lot to James Miller, the plaintiff's uncle, in fee. James Miller died about November, 1805, unmarried and intestate, leaving four sisters his co-heiresses, him surviving. The plaintiff's mother, Euphemia, was a minor at the time of her brother James Miller's death, and before she became twenty-one years old she married Joseph Wigle, and the plaintiff is the oldest child of that marriage, born in 1809 or 1810. On the 28th of March, 1821, Joseph Wigle, and Euphemia his wife,

and the three other co-heiresses of James Miller, with the husbands of two of those sisters, (the third being unmarried), joined in conveying to one Francis Jones, in fee, one equal undivided fifth part of the lot in question, and on the 15th of September, 1821, the plaintiff's mother went before the then Chief Justice of Upper Canada, and he certified to her free and voluntary consent to depart with the land. Euphemia Wigle died in the fall of 1851, leaving her husband and the plaintiff surviving. On the 24th of January, 1822, Francis Jones conveyed the undivided fifth part of the lot to Christopher Arnold, in fee. According to the evidence, and the finding of the jury, Arnold had entered into possession of the lot in 1817. This finding by the jury was on a question left for the purpose of ascertaining when the Statute of Limitations began to run as against the plaintiff's father and mother. This possession probably commenced after the 14th of August, 1817, when Rachel, another of the sisters of James Miller, joined with her husband Joseph Cady, in conveying to Christopher Arnold, in fee, eighty acres of land, being composed of two fifth parts of the same lot, (described as commencing at the north-east angle of the fifth part of the said lot then owned by William McCrea, Esq.,) and I should have thought might have been referred to it, but as the case is stated, the jury have found Arnold to have commenced a possession adverse to the other parties in 1817, and on the 13th of December, 1856, apparently more than five years after the death of Euphemia Wigle, Joseph, her husband, conveyed to the plaintiff all his life or other estate, as tenant by the curtesy of England as surviving his wife, or otherwise to the premises absolutely. Except so far as the conveyance of the 28th of March, 1821, operated, the plaintiff's mother or father never made an entry or did any other act to become actually possessed of her estate as inherited from her brother.

The case was rested before us on the effect and application of our statute of 1834, (4 W. IV. ch. 1) as to the period limited for the bringing of actions, and on the ground that, by the conveyance of the 13th of December, 1856, to the plaintiff the reversioner in fee, the life estate was merged, and so

the plaintiff's right as such reversioner was accelerated to immediate possession, though his father was still alive.

The authorities cited on the the argument were, *Doe v. Twigg*, 5 U. C. Q. B. 167; *Bright v. Walker*, 1 C. M. & R. 211; *Stuart v. Spence*, 10 U. C. Q. B. 486; *Co. Lit.* 18 *a*; *Preston on Merger*, 194, 262, 454, 572; *Crabbe on Real Property*, secs. 2343, 2297; *Com. Dig. Estate B.* 32; *Bisset on Estates for Life*, sec. 44; *Lit. sec.* 263, 264; *Doe v. Ten Eyck*, 7 U. C. Q. B. 600; *Dixon v. Gayfere*, 17 Bev. 433; *Scott v. Scott*, 4 H. of L. Ca. 1065; *Doe v. Brampton*, 3 A. & E. 63; *Shelford's Real Property Acts*, 196; *Corper v. Emery*, 1 Phil., 388; *Lumpfen v. Pitchers*, 13 Sim. 327; *Fulton v. Creagh*, 3 Jo. & Lat. 329.

During the joint lives of the plaintiff's father and mother, they were seized in fee simple of the premises in question in right of the mother, whose inheritance the lands were. The entry of Christopher Arnold, in 1817, and the continuous possession from that time up to the beginning of the action, by him and those claiming under him, would be sufficient to bar the recovery in ejectment against an owner under no disability to assert his right; for that possession was of more than twenty years' duration, and it is not suggested that the case falls within the exception in the 17th section relative to uncultivated lots. Under the 16th section of the act, I apprehend that after the lapse of twenty years, during which Arnold and those claiming under him were in possession, no action of ejectment could have been maintained during the joint lives of the plaintiff's father and mother, in their names. There had been no disability affecting the father during that period, and no such action could be brought without his being a party, and that which would bar him alone, would bar both during his life. If she had survived him, and forty years from the time Arnold took possession had not elapsed, she could, after his death, have maintained an ejectment, for the lapse of twenty years would not affect her, owing to the disability she was under as a *feme covert*.

As, however, she died, her husband surviving, it is argued that conceding that he became tenant by the curtesy, and

inasmuch as he was barred by his own neglect to bring an action during his wife's life, in respect of the fee which he had in her right, he is also barred from asserting a right as tenant by the curtesy after her death, and *Doe v. Mouldsdale* (16 M. & W. 689), is relied upon as establishing this position. That case decided that where a man held an estate *pur auter vie*, and also purchased the reversion in fee in those premises expectant on the determination of the lease for lives, and for upwards of twenty years, before the estate *pur auter vie* terminated, the premises were held adversely to him, the right of entry was barred, and that he had not a new right of entry on the determination of the lease for lives. Under the 5th section of the English act (sec. 17, of our statute), the right to the reversion did not accrue in possession until the expiration of the estate for lives, but the same person who was entitled to the reversion was the tenant *per auter vie*, and the 20th section of the English act (sec. 31 of ours) enacts "that when the right of any person to make an entry or distress, or bring an action to recover any land or rent to which he may have been entitled for an estate or interest in possession shall have been barred by the determination of the period hereinbefore limited, which shall be applicable in such case, and such person shall, at any time during the said period, have been entitled to any other estate, interest, right, or possibility in reversion, remainder, or otherwise, in or to the same land or rent, no entry, distress, or action shall be made or brought by such person or any person claiming through him, to recover such land or rent, in respect of such other estate, interest, right, or possibility, unless in the mean time such land or rent shall have been recovered by some person entitled to an estate, interest, or right, which shall have been limited to take effect after or in defeasance of such estate or interest in possession." In that case the land had not been so recovered by any person, and the court held that the right in respect of the estate in possession, the lease *pur auter vie*, having been barred, the right accruing from the reversion was barred also, as both rights had been vested in the party claiming during the currency of the twenty years' adverse

possession. The estate by the curtesy, though initiate on the birth of the plaintiff, was contingent on the husband surviving his wife, without which it never would be consummate. Fitz N. B. 143. And though the estate, by the curtesy, is in some respects a continuance of the wife's estate, yet the husband, after her death, is certainly in of another estate than that which he had during her life time. And I am not yet quite free from doubt whether *Doe v. Mouldsdales*, can properly be held to govern our decision from the difference which exists in the circumstances of the two cases.

But, admitting for the moment, that the husband was barred of his right to bring an action by reason of the adverse possession of twenty years, both before and after his wife's death, there is no direct authority for holding that such bar operated by way of transfer or conveyance of his particular right to the defendant, or those under whom he claims. Vide *Holmes v. Newlands*, 11 A. & E. 44; *Doe v. Sumner*, 14 M. & W. 39. The 37th section extinguishes the right and title to the land by the lapse of the period limited, and vests a legal fee simple in him who has been in possession during that period, conferring a parliamentary title. If the particular estate continued, it would intervene between the plaintiff's right of possession, otherwise consequent on his mother's death; and so long as that particular estate continued, the time could not be running against him, for he would have no right of possession till that estate was spent, and the period of twenty years would only begin to run as against him from that event. The plaintiff, however, claims immediate possession, not on the ground that the life estate is extinguished, but because it has been conveyed and surrendered to him, and has merged in his reversion, while the defendant insists that the estate for life is a continuing interest to the benefit of which he is entitled by reason of the length of his possession, and he denies that there is any merger as to him, and that by the surrender the reversioner's right of entry cannot be accelerated; in other words, that his right to take possession will not accrue until the death of his father.

I think that as between the reversioner and tenant by the

curtesy, the conveyance of the 10th of December, 1856, operated as a surrender of the life estate, and that the freehold in law vested in the plaintiff before entry. The lesser estate would, by operation of law as between them, merge in the greater, and the plaintiff's right of enjoyment from that time would be immediate, as if the tenant for life had died. 1 Inst. 266, *b*.

But, notwithstanding this merger, persons who have interests affecting the estate merged will be left in the same condition in point of benefit, as if no merger had taken place, and thus a lease made, a rent charge granted, or a judgment confessed by the tenant for life will remain in force, and affect the land during the period of the estate which is merged. The estate continues in point of title, though it is merged in point of law. Mr. Preston states the general conclusion to be drawn thus, "that the particular estate becomes merged, yet all the estates derived out of that estate, and all charges imposed upon the same estate, and all interests created out of it by the person who was at any time the owner thereof shall have continuance notwithstanding the merger of the estate on which the incumbrances were charged, or out of which they were created, in like manner as if the particular estate had continued." Preston on Merger, 454.

He also gives his opinion in regard to the effect of merger (Ib. 577) on the Statute of Limitations, to the effect that persons having rights or titles in respect to the successive estates, cannot cause the effect of surrender or merger of the right or title to a particular estate so as to accelerate the right of the person who is entitled under the reversion or remainder, to pursue his remedy and prosecute his right. Such merger, surrender, or extinguishment would prejudice the person who, under the Statute of Limitations, had acquired a title as against the rightful owner of the particular estate, and, referring to cases where the tenant for the particular estate releases to the disseisor, he concludes, that when there is a disseisin of tenant for life, and as a consequence (with the exception of the king) of a person who has the remainder or reversion, then the release by the tenant for life operates

by way of confirmation of title by adding the right to the seisin, and no *real action* can be maintained by the person who has the reversion or remainder until the determination of the term of enjoyment conferred by the estate for life. He is evidently speaking throughout of the effect of a release to the disseisor, and pointing out the different effect of a release by the tenant for a term of years, and by the tenant for life, which, in the former case, would extinguish the term, but in the latter would enure for the benefit of the disseisor. Even without the authority of decided cases, I should attach great weight to the opinion of a real property lawyer of such profound learning as Mr. Preston. He refers, however, to Co. Lit. 256 *b.*, 275 *a.* In Co. Lit. 357 *b.*, and 358 *b.*, it is said, "having regard to the parties to the surrender, the estate is absolutely drowned," "but having regard to strangers who were not parties or privies thereto, *lest by a voluntary surrender* they may receive prejudice *touching any right or interest they had before the surrender, the estate surrendered* hath in consideration of law a continuance." The result as to this branch of the case is, that the plaintiff's argument based on the effect of the surrender fails.

But a very important, and so far as direct authority is concerned, a new question has presented itself, and has given me a great deal of difficulty, and that is, as to the effect of the first section of our statute, 4 W. IV., ch. 1, on the right of Joseph Wigle to be tenant by the curtesy. The words of the enactment are, "that in every case descent shall be traced from the purchaser, and to the intent that pedigree may never be traced farther back than the circumstances of the case, and the nature of the title shall require, the person last entitled to the land shall, for the purposes of this act, be considered to have been the purchaser; unless it shall be proved that he inherited the same, in which case the person from whom he inherited shall be considered to have been the purchaser, unless it shall be proved that he inherited the same; and in like manner the last person from whom the land shall be proved to have been inherited shall, in every case, be considered to have been the purchaser, unless

it shall be proved that he inherited the same." The interpretation clause (sec. 59) defines "the purchaser to be the person who last acquired the land otherwise than by descent, or than by any partition by the effect of which the land shall have become part of, or descendible in the same manner as other land acquired by descent," and the word "descent" is defined as "the title to inherit land by reason of consanguinity as well where the heir shall be an ancestor or collateral relation as where he shall be a child or other issue." The 10th section of the statute enacts, "that after the passing of this act proof of the entry by the heir after the death of the ancestor shall in no case be necessary in order to prove title in such heir or in any person claiming by or through him." And the 11th section is, "that this act shall not extend to any descent which shall take place on the death of any person who shall die before the 1st of July, 1834."

The enquiry then is, how stood the law as to a husband's right to be tenant by the curtesy before the statute, and whether the statute has made any difference?

If a man died seised of lands in fee simple or fee tail general, (1 Inst. 29 *a*.) and these lands descend to his daughter, and she take a husband and hath issue and die before she makes any entry, the husband shall not be tenant by the curtesy, and yet in this case she had a seisin in law, but if she or her husband had, during her life, entered, he should have been tenant by the curtesy.

In every case where a man taketh a wife seised of such an estate of tenements, &c. (Litt. sec. 52), as the issue which he hath by his wife may, by possibility, inherit the same tenements of such an estate as the wife hath, *as heir to the wife*, in this case, after the decease of the wife, he shall have the same tenements by the curtesy of England, (1 Inst. 40 *a*.) but otherwise not. In commenting on the words "as heir to the wife," *Lord Coke* says, this doth imply a secret of law, for except the wife be actually seised, the heir shall not (as hath been said) make himself heir to the wife, and this is the reason that a man shall not be tenant by the curtesy of a seisin in law. (2 Com. 128).

So in Paine's case, it is laid down, "A man shall not be tenant by the curtesy of land unless the wife was actually seised in deed." And *Blackstone* says, "A man cannot be tenant by the curtesy of any lands of which the wife was not actually seised, because, in order to entitle himself to such estate, he must have begotten issue that may be heir to the wife, but no one, by the standing rule of law, can be heir to an ancestor of any land whereof the ancestor was not actually seised." The rule seems undeniable, that no person could be an ancestor from whom an inheritance of land could be derived, unless he had actual seisin either by his own entry or by the possession of his own or his ancestor's lessee for years, or by receiving rent from the lessee of the freehold. As to this latter there is room for question. See *Co. Litt.* 32 *a.* ; 3 *Rep.* 42 *a.* ; *Doe v. Deen*, 7 T. R. 390 ; *Doe v. Whichelks*, 8 T. 215.

According to the old law, then, unless the plaintiff's mother had an actual seisin in fact, and not merely in law, he would inherit as heir to James Miller, the grantee of the Crown. By the statement of facts, it would appear that Christopher Arnold, in 1817, either abated into the premises, *i.e.*, entered and got possession after the death of Miller, who died seised, and before his heirs entered or he disseised them, and either he ousted them from a freehold in deed, or in law. There is no statement of any entry in fact by any of the co-parceners, and the only act done by the plaintiff's mother in relation to the land, was the execution of the conveyance to Francis Jones, which was in 1821, three or four years after Arnold had entered apparently without right.

Taking the 10th and 11th sections of the statute together, it does not appear to me that it is made unnecessary in this case to prove an entry by the plaintiff's mother. Indeed, it may be doubted whether the 10th section was necessary to enable the tracing of title by descent from the purchaser. There is no such section in the English act, respecting which *Lord St. Leonard* observes, (*Real Property Statutes* p. 275) "the intention of the act was to put an end to the necessity of an actual seisin on the purchaser." And again, "the act does not provide generally for the want of possession in an

heir, nor does it appear to have been necessary to do so, because, as the descent is to be traced from the purchaser, it is indifferent whether the person last entitled was in actual seisin or not, for his seisin, if it existed, would not affect the descent which is not to be traced from him." And again, "It was intended" (by the real property commissioners) "to abolish the rule requiring seisin altogether, and to enact that estates should pass to the heirs of the person who last died entitled, although he might not have had seisin." Our statute has not fulfilled this intention, for while the 10th section renders proof of entry by the heir unnecessary to prove title in him, the first section is identical with the 2nd of the English act, in requiring the descent to be traced, not from the person last entitled, but from the purchaser. And if the plaintiff must shew himself to be heir to James Miller in order to entitle himself to the land, the authorities cited shew that his father would not be entitled as tenant by the curtesy.

Then, under the statute. If it had not been proved that the plaintiff's mother inherited the land, she would have been held to have been the purchaser by the express language of the first section. But such proof was given, and certainly nothing can be at first sight clearer than the words of the act, that in every case descent shall be traced from the purchaser, and the person *last entitled* to the land is to be deemed the purchaser, unless it shall be proved that he inherited the same.

The change created by this act as to lineal descent to the issue, appears to be that formerly the inheritance would lineally descend to the issue of the person who last died actually seised, whereas now it descends to the issue of the last purchaser, and in every case where *there shall be no issue of the purchaser* his nearest lineal ancestor shall be his heir in preference, &c.

Some cases have been decided which tend to shew the construction of this section. In *Doe v. Blackburn* (1 Mood. & R. 547) a father who was illegitimate was the purchaser, and on his death the estate descended to his son, who died intestate and without issue. *Park, B.* held that his heir,

ex parte materna could not take the estate. The descent, as *Lord St. Leonard's* says, (Real Property Statutes, 209), "is to be traced from the purchaser, and not from the person last seised, and in this case, although the son was the person last seised, yet he was not the purchaser under the 2nd section, (1st in our act), because it was proved that he inherited it from his father, and the mother's relations could not, as such, be heirs to the father."

The case of *Cooper v. France* (14 Jur. 214), may seem to conflict with this. There the purchaser died leaving two coheiresses, each of whom died intestate, leaving a son and heir. It was contended that on the death of the first coheiress, as her share must be claimed by descent from her father, it would descend from him in equal moieties on the surviving co-parcener, and on the heir of her who died, who would therefore only take one half of his mother's share. And that on the death of the second coheiress, a similar tracing of the descent as to the share she died possessed of must take place, and consequently that the heir of the co-parcener who died first, was in the end entitled to five-eighths, and the heir of the other coparcener to only three-eighths. But *Sir L. Shadwell*, V. C., rejected this construction, and held that the whole of the share of each co-parcener descended on her son, and *Lord St. Leonard's* approves of the decision. I have not the presumption to doubt its correctness, though the reasons given for it are not very satisfactory. It has been remarked upon this decision that it is too often the policy of our courts to decide against principle in order to avoid the consequences of an obvious blunder of the legislature. But it appears to me the true reasons for this judgment are given by Joshua Smith in his principles of the law of real property. (Appendix p. 383, 4th edition). He collects the authorities applicable, first, to the descent of an estate tail, under the circumstances described according to the old law, and then those applicable to the course of descent of a fee simple according to the old law, under the same circumstances, but assuming that neither of the co-parceners had obtained any actual seisin of the lands, and points out that the rule that

descent should be traced from the purchaser whenever it applied, was governed by another rule; that the issue of every deceased person should, *quoad* the entire share of such person, stand in his or her place, and contends that the same rule of representation should govern descent, now that the statute has made the rule tracing descent from the purchaser applicable in every case. The principle is, that the child of the co-parcener is entitled to the mother's share, not as heir, tracing descent, and deriving the right of inheritance *from* her, for she never was seised in the case supposed, but as tracing descent, and so deriving the right from the grandfather, the purchaser. And in this way *Cooper v. Francis* does not set up a construction of the statute infringing on the rule that in *every case* descent is to be traced from the purchaser.

Applying this rule then, to the claim of the father of the plaintiff to be tenant by the curtesy, and taking in connexion with it the authorities already cited establishing that he shall not be tenant by the curtesy except of lands of which his wife was seised of such an estate as that her issue by him might inherit as heir to her, the conclusion appears adverse to the claim. The plaintiff must trace the descent from his uncle, the purchaser, and not from his mother, who is proved to have inherited, and then the estate by the curtesy does not arise. And Mr. Williams in the same appendix (p. 405) admits that it seems a fair and proper deduction from the authorities, that whenever a woman has become entitled to lands by descent, her husband cannot claim his curtesy, because the descent of such lands on her decease is not to be traced from her. But he proceeds to say that there may be reason to doubt, if not deny, that such is the law, not that the conclusion drawn is unwarranted by the authorities, but that the authorities themselves may perhaps be found to be erroneous, and after a long discussion of them he concludes that the husband of a deceased co-parcener who has had issue by her is entitled to curtesy out of the whole of her share, adding, "but, in order to arrive at this conclusion it seems we must admit first that *Lord Coke* has endeavoured to support the law by one reason too many,

and secondly, that one laudatory flourish of *Blackstone* has been made without occasion." After the best consideration I have been able to give to the question, and with great respect for the learning and ability of Mr. William's argument, I cannot bring myself to make the admissions without which his conclusion is confessedly not tenable.

But if the case of *Doe v. Mouldsdale* (16 M. & W. 689), is in effect applicable to the case, and the twenty years' possession barred, not only the husband's right of entry, during the joint lives of himself and his wife, but also his life estate as tenant by the curtesy, (admitting also that he had such estate initiate during his wife's life,) then, it would seem that by the 37th section of our statute (sec. 34, of the English act), when the remedy is taken away by the lapse of the prescribed period, the right and title of the person in the land is wholly extinguished. The statute in effect gives, after the proper period of limitation has passed, to the party who has been in possession, a legal title against the party who has neglected to assert his rights, and not only bars any recovery, but wholly destroys the right of such party, and of all who claim under him. No question has been raised on the part of the plaintiff, as to whether the life estate was so extinguished, that on the death of his mother he became entitled to immediate possession, and as I am of opinion in the plaintiff's favour upon the ground that the husband was not entitled to the curtesy, I have not felt it necessary to give this latter point any further consideration. It is easy to perceive that if the twenty years' possession by defendant extinguished all the title of the husband, there would not have been any estate for life remaining at the death of the wife to intervene and postpone the plaintiff's right to immediate possession, unless (which I do not think) the twenty years' possession operated as a conveyance of the husband's life estate, if he had any, to defendant by force of the statute.

The plaintiff's mother was, during all her life, after Arnold's entry, under a disability to assert a right, and the forty years had not expired when this suit was commenced. He is, therefore, in time, and in my opinion is entitled to

recover, though his recovery must be limited to an undivided fifth part of that portion of the lot described in the declaration. The sufficiency of the deed of the 28th of March, 1821, and the acknowledgment of its execution so as to pass the estate and interest of the plaintiff's mother of and in the land described therein, was apparently conceded during the argument.

Vide Co. Litt. 338 *b*; Doe v. Rucastle, 8 C. B. 876; Scott v. Scott, 4 H. of L. Ca. 1065; Doe v. Liversedge, 11 M. & W. 517; Creagh v. Blood, 3 Jo. & Lat. 134; Kilborn v. Forester, Drap. Re. 344; Doe v. Bramston, 3 A. & E. 63; 2 Bl. Com, 195, 209; Litt. sec. 636; Co. Litt. 337 *b*; Doe v. Rivers, 7 T. R. 276; Doe v. Scudamore, 2 B. & P. 294; Crump v. Norwood, 7 Taunt. 362; Grenely's case, 8 Co. 144; Touchst, 44 *et seg.*; Bro. Ab. Prœcipe, 38; Year Book, 35 H. 623; Doe v. Whichelow, 8 T. R. 211; Co. Litt. 164 *a*, 172 *b*; Parker v. Carker, 4 Hare, 416; Follett v. Tyrer, 14 Sim. 125; Smith v. Lloyd, 9 Ex. 562.

RICHARDS, J.—I think the conveyance in which Mrs. Wigle and her husband joined with the other co-heiresses, to Jones, of the undivided one-fifth of the lot which they inherited from their brother, is sufficient to pass the equal undivided fifth part of the lot so far as Mrs. Wigle and her husband were concerned. The deed on the face of it appears to have been executed by her and her husband, and she went before Chief Justice Powell, and made the necessary acknowledgment of her willingness to depart with her estate in the land in the deed mentioned, and he certified that she appeared to do so freely and voluntarily. The cases referred to in 14 U. C. 459, and 4 C. P. 272, will apply to this point, and I think support the view I take, and the deed was properly executed, and if so, it is sufficiently certain to pass the undivided fifth part of the lot to Jones. Then the question raised, as to the right of entry accruing in 1805, and the necessity of bringing the action within the twenty years from that period. Under the statute the time only commences to run from the period when the claimant

is out of possession, and some one else in. In *Smite v. Lloyd*, 9 Ex. 572, *Parke, B.*, observes, "We are clearly of opinion the statute (3 Wm. IV., ch. 27, secs. 2 and 3,) does not apply to cases of want of actual possession by the plaintiff, but to cases where he has been out of and another in possession for the prescribed time; there must be both absence of possession by the person who has the right, and actual possession by another, whether adverse or not, to be protected, to bring the case within the statute."

As to the statute not running with respect to the wild land, I am of opinion that when a party goes into possession of a lot of land which has been granted by the crown, on which he clears and puts his fence from time to time as he may require to protect his clearings, and uses the bush land for the purpose of taking firewood, making sugar and cutting timber as he thinks proper, and using it as the owners of such lands in the neighbourhood use their bush land, although such bush land may not be actually inclosed by a fence, it is, nevertheless, drawn to the possession of the rest of the lot, and possession of part becomes possession of the whole. I do not consider this view conflicts at all with the cases decided in relation to disputed boundaries, when it is attempted to extend an assumed conventional line on the naked possession of a part inclosed within a fence, to a part of the lot which has never been inclosed, and which parties cannot know was ever intended to be inclosed.

The jury having found that *Arnold* was not in possession until 1817, but from that time forth that he was, puts the question on the broad ground whether the Statute of Limitations runs as against the plaintiff. This action was commenced on the 25th of January, 1857, and *Arnold's* possession being found by the jury to commence in 1817, being in fact, as I take it, from the date of the deed from *Cady* and wife to him, the 14th of August, 1817, thus relieving us from the consideration of the question as to the effect of forty years' possession.

When plaintiff's father married *Euphemia Miller*, he took a freehold interest during their joint lives in the undivided one-fourth part of the lot which she inherited in coparcenery

with her sisters, and such interest would have passed by a conveyance executed by him alone. In strict legal language, when the wife has an estate, it is said the husband and wife (and not the husband only) are seised in right of the wife. *Robertson v. Norris*, 11 Q. B. 916; *Burton*, sec. 575, *Smith on Real and Personal Property*, sec. 884. On the birth of a child the right of plaintiff's father was further enlarged, so that he could have conveyed by feoffment an estate for his own life, whereas before the birth of the child he could only convey a good estate for the joint lives of himself and wife,—*Burton* sec. 350, *Smith* sec. 133. Yet it is laid down that the estate of the tenant by the curtesy is not *consummate* until the death of the wife, but as soon as the husband had issue by her, his title became *initiate*. *Cruise's Digest*, vol. 1, pages 144, 147.

The right of plaintiff's father to bring an action to recover possession of the *locus in quo* existed from the year 1817, for his wife was then living, and the estate vested in her, and I have no doubt from the facts shewn that his estate by the curtesy had at that time become initiate, for, as I understand, plaintiff was then born. If this be correct, then as against the father, I think the statute would commence to run from that period, and his right would be barred in 1837. It is very probable that if the wife had brought an action, joining her husband with her, that her coverture would be an answer to the statute, if the twenty years' possession had been set up, but if the husband alone brought an action in his own right, I think the statute might be set up against him. If, then, the statute would be a good bar as against the father of the plaintiff, can it be set up against this action brought by the plaintiff during the lifetime of the father, or in other words, can the life estate of the father be set up against the plaintiff's right to recover, although his father, since his right was barred, has released his estate for life as the tenant by the curtesy to the plaintiff his son.

If the right of the father to recover was barred during the lifetime of the wife, the fact of his estate as tenant by the curtesy becoming consummate by the death of his wife,

gives him no new right to recover. The case of Doe Hall v. Mouldsdale, 16 M. & W. 689, in effect decides that where the right to make an entry vests in the same person, but in two different rights, if one of the rights be barred by the statute, the other is barred also. In that case an estate *pur auter vie* and the reversion both became vested in the lessor of the plaintiff. The estate for lives was barred, and it was held that although the estate in reversion vested in him within twenty years, he could not recover under the 3rd sec. of 3 & 4 Wm. IV., ch. 27, (like sec. 17 of our provincial statute 4 Wm. IV., ch. 1).

If, then, plaintiff's father was barred after his wife's death, the plaintiff's right to recover can rest only on the ground that by the release of the outstanding life estate, it merged in the reversion, which plaintiff had vested in him on his mother's death, and was so completely drowned that any estate carved out of it would be of no avail. Or as has been suggested, that the father's estate as the tenant by the curtesy having been barred by the statute, it is the same as if it had been extinguished by his death. It appears to me the two propositions are substantially resolved into this, whether the life estate of the father, being barred by the statute, can be set up as against the plaintiff's right to recover, he having obtained a release of that estate; or, in other words, whether that estate must be considered as a subsisting one to preserve the interest acquired by the defendants under the statute, notwithstanding the release to the plaintiff.

If plaintiff's father had made a lease or created any incumbrance on his life estate, there is no doubt that, notwithstanding his subsequent release, the term so created would subsist in like manner as if the particular estate had continued. This doctrine is broadly laid down in Preston on Conveyancing, 3rd vol., at page 458. He refers at page 455 to an exception, a note to a case in Moor, page 8, where a woman tenant in tail made a lease for years, not warranted by the statute of Henry the 8th, then took a husband and died; the husband being tenant by the curtesy surrendered to the issue, it was held the issue might avoid the lease in the

lifetime of the husband, and yet the lease was good as against him. At page 575 it is stated, "the general rule is that a stranger or *third person* shall not be prejudiced by merger." In referring to the effect of merger on the Statute of Limitations and of non claim at pages 577 and 578, it is further stated, "These statutes never operate except against rights and titles of entry and of action. An estate whilst it remains an estate cannot be barred by either of these statutes. Therefore persons having rights or titles in respect of successive estates, cannot, it is apprehended, cause the effect of surrender or merger of the right or title to a particular estate, so as to accelerate the right of the person who is entitled under the reversion or remainder to pursue his remedy and prosecute his right. Such merger, surrender, or extinguishment would prejudice the person who, under the *Statute of Limitations*, or under the non claim on a fine, *had acquired a title* as against the rightful owner of the particular estate." Preston states the effect on the rights of the reversioner of a release by the tenant for years and for life to the disseisor, and concludes at page 578, "And when the termor for years is barred *and no* release taken, then it shall seem that the disseisor may protect himself in the possession during the term."

Of course, at the time Preston wrote, the old Statute of Limitations barred the remedy only and not the right, but the modern one cuts off the right as well as the remedy, (*Dundee Harbour Trustees v. Dougall*, 1 Mac. H. of L. Cases 317). It has been suggested by some writers, but this opinion does not seem well founded, that the statute operates in the same way as a conveyance of the right would. Yet if the right of the party entitled to the possession passes to the party who has dispossessed him, or at all events, if his default to make the entry within twenty years has cut off his right as well as his remedy, how can he, as against the right acquired by the tenant in possession, by his release convey any thing to him who had the residuary estate.

On the whole, I am of opinion that the Statute of Limitations has barred the right of plaintiff's father to recover possession in ejectment of the *locus in quo*, and after his

right was so barred, a release to the plaintiff of his estate would not authorise the latter to bring such an action during the lifetime of his father. I think the defendant, being in possession, can set up the life estate of the father and the interest acquired by virtue of the Statute of Limitations under it, against the right of the plaintiff to recover in this action.

I had arrived at the conclusion above stated before the case was re-argued, and a reconsideration and discussion of the subject has not convinced me that I ought to alter anything I have written. I understand that his Lordship the Chief Justice is inclined to concur in the conclusions at which I have arrived, if it be admitted that plaintiff's father was the tenant by the curtesy of the *locus in quo*; but he is of opinion that, under the 1st sec. of the provincial statute, 4 Will. IV., ch. 1, similar to imperial statute, 3 & 4 Will. IV., ch. 106, sec. 2, plaintiff takes by descent from his uncle, and therefore his father could not be tenant by the curtesy.

Mr. Justice *Hagarty* is of opinion that the father of plaintiff had not any estate by the curtesy, as he thinks the wife had no seisin during the coverture. I do not understand the Chief Justice to agree with him on this point. I think the evidence of seisin sufficient. The father and mother of plaintiff both joined with the other heirs in a conveyance to Jones, from whom Merrick bought, and they divided the property amongst themselves though not by deed; but if there is any doubt on this point, a new trial ought to be had to determine it.

The other point, however, as to the effect of the statute of Will. IV., is of great importance; it was not raised or argued before the court, and I am not aware of any case decided under the statute which goes to the extent of declaring that its true legal effect is to deprive the husband of an heiress of his *curtesy* in her inherited estates, on her death, if he had children by her.

Lord St. Leonards, in his *Essay on the New Statutes*, at page 281, referring to the English act (sec. 2 of 3 & 4 Will. IV., ch. 106), observes: "By a literal construction of the section, it was generally supposed that, if a man purchased

in fee, and died, leaving issue three daughters only, and one of the daughters afterwards died intestate, leaving issue a son; then as the descent was to be traced from the purchaser, the share of the deceased daughter would descend to her surviving sisters and to her own son in coparcenery, and consequently in the result each of the surviving sisters would take four-ninths and the son *one-ninth* only of the entirety." This construction would have surprised the framers of the act, who evidently did not intend to provide against the whole estate of a woman, although a coparcener, descending to her son: that was a case which required no remedy. The late V. C. *Shadwell* accordingly decided that the case was left to the old law, and that the son would inherit the entire share of his mother: in thus deciding he did no violence to the words of the statute, but by a judicious construction of them prevented them from creating a mischief where none before existed; it would have been no amendment of the law of inheritance to take from a son two-thirds of his mother's estate in order to vest them in his aunts'. He then refers to the facts of the case, *Cooper v. France* 14 Jur. 214, and proceeds: "But *Shadwell*, V. C., during the argument, said the question was, whether the act applied to a case which was perfectly plain before, as, for instance, to the case of descent on an eldest son. The question was, whether where a lady died owner of an estate, it was necessary to make any question about her descent if she leaves an only child. Whether this section will be made to apply to a case when the circumstances did not require that the person last entitled to the land should be considered the purchaser: whether for tracing any descent which the act meant to interfere with, it was necessary to trace it further than from the mother to the son. You make this absolutely necessary, if you suppose that the act meant to interfere with a plain case, about which there could be no dispute." In giving judgment, the Vice-Chancellor observed that he could not bring himself to entertain a doubt that the mother's share descended to her son; he did not see how any one acquainted with the principles of law could doubt. Could you suppose that an act of parliament, by any portion of it, meant to

introduce doubt into a case that was so plain before the act was passed; was it not the meaning of the act to leave the law of inheritance in such parts as were plain absolutely as it was found, and only to alter it where it was doubtful. Just observe what was the purview: "To the intent that the pedigree may never be carried further back than the circumstances of the case and the nature of the title shall require." That was the general object stated in distinct words: "The person last entitled to the land shall, for the purposes of this act, be considered to have been the purchaser thereof, unless it shall be proved that he inherited the same." There the act was speaking of what ought to be the rule in case where the thing was doubtful, but not where the thing was so plain that nobody could doubt. You must make it consistent; and if you see an act passed to make the thing clear, do not say that the act was to make it doubtful. On looking through the act, that portion of the section appeared to be so plain to him, that he should not send the case to law, although he had in the first instance intimated that it would be necessary to do so. In a note, the learned author remarks: "The real property commissioners observe in their report that the rules of descent are for the most part well understood, and appear to be well suited to the habits and feelings of the people. They state the descent to be to sons and their descendants, and in default of them, to daughters in equal shares, and to the descendants of any deceased daughters, such descendants taking the share which would have gone to the parent if living. When there is no *lineal descendant*, the estate goes to the brothers or their descendants, and in default of those, to the sisters or their descendants as before (in the usual priority). *In case of the failure of brothers and sisters, and their descendants, it becomes necessary to enquire* whether the deceased proprietor took the estate himself by inheritance, or whether he acquired it immediately by a deed or will, or, in technical language, *was a purchaser.*"

I have not met with any thing to induce me to suppose that Lord St. Leonard's doubts the correctness of the doctrines enunciated by Vice-Chancellor Shadwell in *Cooper v. France*,

and I am not prepared to decide against the views of so profound a real property lawyer, that the section of the act is intended to apply to so plain a case as the son inheriting the real estate of his mother on her death. I cannot yet clearly see the effect such a decision may have on many important interests. If the broad doctrine is to be laid down that, in all cases, upon the death of a party who *inherits* an estate, his heir is not to inherit from him, but must trace his descent from a previous ancestor *purchaser* from whom he is to inherit; then is such estate to be made answerable for the debts of the person who died seised, or will his son and heir take such estate direct from the ancestor purchaser relieved from any liability as assets or otherwise for his father's debts. An anonymous writer, supposed to be a conveyancer of no mean repute in England, in discussing this section in an article in the 4 vol. N. S. Eng. Jurist, part 2, page 73, signed G. S., states: "Upon the death, then, of a person seised of an estate in fee, a descent takes place now as formerly. The person to take the inheritance will take it as heir of the deceased, but he will trace his descent, *i. e.*, as the act explains his title to inherit, from the purchaser; he will, by shewing his relation in consanguinity to the purchaser, prove his title to inherit from the person last seised."

In Smith on Real and Personal Property, page 337, he adds to the section of the statute as to tracing descent from the purchaser, "except that it would seem that when the person who died last entitled left issue, the descent is to be traced from him, even though such person inherited the same."

On the whole, then, I think the plaintiff fails to make out a case, and that the verdict for the defendant should stand.

HAGARTY, J.—I consider the plaintiff entitled to judgment. On the facts submitted it would appear that Euphemia never had actual seisin, but merely seisin in law of the premises. The authorities seem very clear against the existence of any tenancy by the curtesy under such circumstances.

I do not think that the evidence shews any such posses-

sion by any coparcener or tenant in common as would enable us to consider Euphemia's son in possession, or seised in fact.

The jury found that Arnold entered in 1817, and the case on both sides was argued as if there had been a disseisin by him at least from that year, and no suggestion was made that his possession could enure to the benefit of Euphemia. The defendant's counsel specially relied on the Statute of Limitations on Arnold's entry, and argued further that the statute ran from the death of patentee before the coverture of Euphemia.

This would at once dispose of the case in favour of the plaintiff. The authorities seem also to preponderate in favor of the position that, when descent has to be traced from the purchaser under the statute, so that the issue cannot be said to inherit from the mother, who took by inheritance and not as purchaser, there was no tenancy by the curtesy in the father.

I do not found my judgment on the possible state of the law as to disseisor Arnold being entitled to hold during the life of plaintiff's father, the supposed tenant by curtesy, notwithstanding his release to the plaintiff. A very long examination of authorities has disclosed little on this point beyond the opinions expressed in Mr. Preston's chapter on Merger, written before the 3 & 4 Wm. IV.

I incline strongly against this alleged right of the disseisor on the law as it now stands. I do not found my judgment on this branch of the case. The law appears to me to be in far too doubtful a state on this point to induce a court unnecessarily to commit itself to a decided expression of opinion on it.

Judgment for plaintiff, for one undivided fifth.

RICHARDS, J., dissenting.

PETRE ET AL. V. MAILLOUX.

Real estate—Limitations.

Forty years are allowed for the bringing of actions for land or rent in case of disabilities. Forty years are not the universal bar. Twenty years form the regular bar. But the twenty years run only from the time the first right accrued.

EJECTMENT, for the undivided moiety of lot No. 72, in the first, second and third concessions of the township of Sandwich. Writ issued 22nd of February, 1858. Defence limited to the lands in the first concession. The plaintiffs gave notice of title in Denis Petre, as eldest son and heir at law of Claire Petre, one of the daughters and co-heiresses of Jean B. Mailloux, the original grantee from the Crown; and in the other plaintiffs as assignees of Denis Petre. The defendant gave notice of title as grantee of Antoine Mailloux, eldest son and heir at law of Joseph Mailloux, grantee of Jean B. Mailloux, the grantee from the Crown; and defendant also claimed title by length of possession in himself and those through whom he claims.

The case was tried at Sandwich, in April, 1858, before the *Chief Justice* of Upper Canada. The plaintiff put in the grant from the Crown for the land in dispute to Jean Baptiste Mailloux, dated the 10th of March, 1804. The grantee died on the 18th of December, 1804, leaving two sons and two daughters him surviving. Both the sons died young. His youngest daughter, Claire, born 23rd of September, 1793, married Jean B. Petre on the 17th of January, 1809. She died on 12th of May, 1829. Her husband survived her, and died five or six years ago. The plaintiffs are children of Claire by this marriage. By deed dated 31st of July, 1857, Denis Petre, her eldest son, conveyed the undivided five-sixths of the land to the other children. On the defence was proved an instrument, dated 25th of February, 1818, from Jean Baptiste Leblanc, and Jean Baptiste Petre, whereby, in consideration of £75, they remised, released, and for ever quitted claim, unto Joseph Mailloux, and to his heirs and assigns for ever, all their estate, right, title, interest, claim and demand whatsoever, of, in, and to that certain parcel or tract of land and premises known to

be lot number seventy-two in the town of Sandwich, in the actual possession and occupation of the said Joseph Mailloux, *habendum* in fee : soth that neither they, nor any person for or under them, should claim or demand any estate, &c., but from all and every action, estate, right, &c., shall for ever be barred, and they and their heirs, the said land to the said Joseph Mailloux, will for ever warrant and defend. This deed was signed and sealed by the releasors, and underneath were written two instruments under the hand and seal of each of the wives of the releasors, as follows : "I, Catherine Mailloux," (in the other "Claire Mailloux") "daughter of J. B. Mailloux, do confirm and ratify these presents for me and my heirs and assigns." In presence of two subscribing witnesses, Sandwich, 30 April, 1819. The whole was registered on 15th of November, 1852.

A receipt was also put in, signed by the two releasors and their wives, acknowledging that they "had and received this 13th of April, 1819, of and from Joseph Mailloux, the sum of \$100, awarded to us by arbitration in full payment of all claims and demands whatsoever on the lands of" J. B. Mailloux, deceased.

By deed dated 27th of September, 1839, Antoine Mailloux, son and heir of Joseph Mailloux, conveyed to the defendant part of lot number seventy-one (should be *two* apparently) in the first concession of Sandwich: *habendum* in fee. The circumstances proved took the case out of the proviso in the 17th section of the act as to lands granted by the Crown, and of which actual possession is not taken by the grantee.

On the evidence for the defendant it appeared that the plaintiffs were in error in supposing that the patent from the Crown issued to Jean Baptiste Mailloux, the father of Claire. It was to her brother Jean Baptiste Mailloux, who died a minor and unmarried in December, 1804. According to the defendant's witnesses Joseph Mailloux took possession of the lot defended for before the grant from the Crown issued, and remained in possession until his death in 1834 (September). Antoine succeeded him, and made the deed to defendant in September, 1839, and defendant has been in possession ever since.

It was further proved, that an award was made on the 25th of February, 1818, founded upon a submission to arbitration under seal between Jean Baptiste Leblanc and Jean Baptiste Petre, on one side, and Joseph Mailloux, on the other, respecting disputes between them as to lot number seventy-two, formerly the property of the late Jean B. Mailloux, deceased, then in the possession of Joseph Mailloux in right of purchase, and claimed by three others in right of marriage with Claire and Catherine, co-heiresses of the grantee. The decision was that Joseph Mailloux should pay \$100 to the other parties, and that he should for ever after hold, occupy, &c., the said parcel of land, without the let, &c., of Petre and Leblanc, or any other person, and that the parties to the submission should execute mutual releases.

The learned *Chief Justice* considered that the patentee being a minor, both at the date of the grant and of his death, and Joseph Mailloux being then in possession, there was one disability in respect to him: that Claire being a minor when the estate descended upon her, and having married while a minor, and continued under coverture till her death, the true owners would be barred at the expiration of twenty years from the death of the grantee of the Crown. He directed a verdict for the defendant, reserving leave by consent for the plaintiffs to move to enter a verdict for them, if the court should think them entitled to succeed on the evidence.

In Easter Term *O'Connor* moved accordingly. He referred to *Allan v. Levesconte*, 15 U. C. Q. B. 9; *Rawle on Covenants*, 37, 401; *Bacon's Abridg. Title Warranty*. He argued that the Statute of Limitations did not operate to bar this action, because Joseph Mailloux had taken a release from the father of the plaintiffs of all his right and interest in this land, and must therefore be taken to hold the possession of the estate during his life under that release, and to hold only for his life, recognising the right of Claire, the plaintiffs' mother, through whom the father claimed and had a right and estate in the land.

A. Prince, contra, insisted that the Statute of Limitations

clearly applied. That it began to run, owing to the succession of disabilities, from the death of the grantee of the Crown in 1804, and that not merely twenty but forty years have run since then.

DRAPER, C. J., delivered the judgment of the court.

“No entry, distress or action can be made or brought by any person who at the time at which his right to make an entry or distress or to bring an action to recover any land or rent first accrued shall be under any of the disabilities before mentioned (infancy and coverture being among them), or by any person claiming through him, but within forty years next after the time at which such right first accrued, although the person under disability at such time has remained under one or more such disabilities under the whole of such forty years; or although the term of ten years from the time at which he ceased to be under such disability or deed has not expired, nor (although the person under a disability dies without having ceased to be under such disability) is any term beyond the period of twenty years, or the period of ten years to be allowed by reason of any disability of any other person; or, in other words, a succession of disabilities does not extend the time.” Sugden on R. Pro. Act, p. 71.

Such is the deduction of Lord *St. Leonard's* from the provisions of the imperial statute 3 & 4 Wm. IV., ch. 27, which relates to the periods within which actions for land or rent must be brought, and the savings in case of disabilities. It is only necessary to observe that the provisions of our own statute of 1834 are in these respects precisely similar—“Forty years are not however a universal bar. *Id.* 866. The twenty years form the regular bar and the savings are the exception, and the forty years run only in the case of disabilities, in even which case not more than forty years are allowed. But the twenty years run only from the time when the right first accrued, and that (in the case of a remainder for example) is not until it falls into possession, which event in the common course of an estate for life with a remainder over may not happen within forty years of its

creation.” “Unless where existing rights are preserved, in the instances already pointed out, the time which may have run before the passing of the act, even where it has not barred the right, will count as part of the period allowed by the new law, and therefore it will continue to run until it amounts to the twenty years, or it may be the forty years, allowed by the new law.”

From the evidence given at the trial it is possible that Joseph Mailloux was an intruder upon this land at the time that the title thereto was in the Crown; and not only is there no evidence to shew that either the grantee or Claire Mailloux (afterwards Claire Petre) actually entered, but every thing that is proved leads to the contrary conclusion. It has not, however, been urged before us that on this account the statute would not bar the claimants, on the ground that neither the grantee nor any one claiming under him were ever in possession in respect of the estate granted, nor was any such question raised at the trial. The evidence of Joseph Mailloux's possession does not extend with certainty more than fifty years before the trial—that is, not further back than 1808—at which time the two sisters, Catherine and Claire, were seised as co-parceners. Though Charles Mailloux, a brother of the defendant, swore that he was born in 1800; that as long as he could remember his father had possession of lot No. 72, and that he remembers the brother of Catherine and Claire (the grantee of the Crown), who was killed by the fall of a tree when twelve or thirteen years old. Now, if he (the grantee) died in 1804, as is sworn by other witnesses, the recollection of this witness carries the evidence of possession as far back as that year, in which the letters patent issued. But the witness himself would then have been only about four years old. The weight of evidence appears to me in favour of treating the possession of Joseph Mailloux as beginning after the death of the grantee of the Crown.

At the time, therefore, that Claire by this possession was put to a right of entry she was a minor, and continued so till her marriage, when another disability supervened, which continued till her death in 1829, more than twenty years

after Joseph Mailloux entered. She became of age in 1814. If her husband took an estate by the curtesy, his release of the 25th of February, 1818, would prevent his asserting it. The plaintiff, Denis Petre, under whom all the other plaintiffs derive title, came of age on the 12th of September, 1830. His father lived until five or six years before this action was brought. But, as for the same reasons as are just given in the case of *Wigle v. Merrick*, I think his father was not entitled to an estate by the curtesy: there was nothing to prevent Denis Petre from asserting a right of entry, if he had one, as soon as he came of age. But this action is not brought within forty years from the time that Joseph Mailloux entered claiming to be owner, and there has been a succession of disabilities.

The fact that Joseph Mailloux took the release from J. B. Petre makes no difference. He merely took a surrender of a conflicting claim, but is bound by no estoppel to acknowledge a right or estate in the releasor.

I think, therefore, the rule should be discharged.

Per Cur.—Rule discharged.

O'NEIL V. CAREY.

Conveyance—Estate.

Held, that the words, “all my right, interest, and estate of, in, and to the estate of Garrett Miller” in a conveyance passed all the estate of the grantor therein.

EJECTMENT for part of lot No. 19, 5th concession of Loughborough. Plaintiff claims under a deed from Douglas Prentiss, dated 20th March, 1857. Defendant claims by adverse possession, and by deed from one Daniel Perry, for 155 acres, being all the lot except 45 acres of the south east part, sold for taxes, which said 45 acres he claims by deed from the sheriff.

At the trial at Kingston, before *Draper*, C. J., in April last, the plaintiff put in an exemplification of letters patent, bearing date the 10th of August, 1801, by which lots Nos. 19 and 20 were granted to Garrett Miller, of the township of Ernesttown. The patentee, as was proved, had

several sons, the eldest of whom was named Martin, who died during his father's lifetime leaving children, the eldest of whom was named Robert. Garrett Miller, the grantee of the Crown, died about the year 1828. Robert Miller, his grandson, was said to have left Ernesttown, where he and his father had lived, about 1832, or, perhaps, two years later. He moved to Zorra, and about 1837 went to the State of Indiana, where he was supposed to have died. William Miller, a son of the grantee of the crown, who was examined for the plaintiff, on cross-examination stated, that his father owned other lands in Loughborough besides these two lots: that he sold one lot, either 19 or 20 in the 5th concession to him, the witness, and another to the witness' brother, also named Garrett Miller, about 40 years ago: that the lot the witness got was mostly in the lake: that he sold his lot to one John Comstock, of Ernesttown, and he supposed he gave him his title deed: that he was well satisfied the lands in the back concession of Loughborough came to witness' nephew Robert. It appeared during the evidence that this lot No. 19, in the 5th concession, was a good part of it covered by water. A brother of Robert Miller's, also named Garrett, swore that 15 or 20 years ago he went in search of his brother Robert, to buy his interest in their grandfather's estate, and obtained a deed from him which he produced, on behalf of plaintiff. It was as follows:—
“Know all men by these presents, that I, Robert Miller, late of the township of Zorra, in the London district and province of Canada, for and in consideration of the sum of twenty-five pounds of lawful money of this province, to me in hand paid to my satisfaction, have and do hereby grant, bargain, sell, assign and set over to Garrett Miller, of the township of Camden, tailor, all my right, interest and estate of, in, and to the *estate* of Garrett Miller and Martin Miller, both of Ernesttown, late deceased, to him the said Garrett Miller, his heirs and assigns for ever, the said Garrett Miller deriving all benefits accruing from the said estates to him and his heirs for ever, and the said Robert Miller divesting himself and his heirs to all his or their right, title, interest and estate therein. In testimony whereof the saith

Robert Miller hath hereunto set his hand and seal, this day of May 3, 1830," (the last figure but one in the date of the year being so written that though more like 3, than either 4 or 5, it might just possibly have been intended for either.)

(Signed), "ROBERT MILLER.

In presence of (Signed),

"SAMUEL SMITH,

"GEORGE PECK."

The date of the deed, and the signatures of the grantor and the subscribing witnesses, are in a very different coloured ink from the body of the instrument, which bears the appearance of having been prepared some time before it was executed, the ink having a much older appearance, being black, while the names and dates are written in blue ink. This deed was never registered. By indenture, dated the 29th of July, 1842, Garrett Miller, Jr., in consideration of £90, sold and conveyed to Daniel P. Aylesworth, in fee, part of lot No. 19, 5th concession of Loughborough, containing 150 acres, described by metes and bounds. This deed was never registered. By indenture, dated the 14th of November, 1842, Daniel P. Aylesworth granted, &c., among other lands, the same part of No. 19, 5th concession Loughborough, in fee, to Douglas Prentiss, subject to a proviso for the redemption thereof on payment of £400, with interest, on the 4th of November, 1843. This deed was registered on the 29th of December, 1842. By indenture, dated the 11th of November, 1853, Daniel P. Aylesworth and Lucinda his wife, in consideration of £400, sold and conveyed the same lands to Douglas Prentiss in fee. This deed was registered on the 11th of October, 1854. And by indenture, dated the 27th of February, 1857, Douglas Prentiss, in consideration of £150, granted unto the plaintiff, his heirs and assigns for ever, by way of assurance and not of covenant or warranty, the same part of No. 19, 5th concession Loughborough, and released to plaintiff, his heirs and assigns, all his (the releasor's claim) upon the said land. This deed was registered on the 20th of March, 1857. The purchase money was secured to Prentiss by a mortgage of a different lot, made by plaintiff's

father. Mr. Prentiss proved that seven or eight years ago the defendant came to him, saying he wanted to purchase this land: he came several times: he never said he owned or pretended to own the lot, or to claim title to it, but stated he was upon it. At one time he offered £75, at another £100 for it. This was while Prentiss was only mortgagee. Defendant came about a year before the trial in February, 1857, to Prentiss, still wanting to purchase.

The defendant offered no evidence, and the jury gave a verdict for the plaintiff. But the defendant had leave to move for a nonsuit, on the objection taken to the sufficiency of the deed from Robert Miller to Garrett Miller, to pass these lands or any estate in them.

In Easter Term, *H. Smith*, Q. C., obtained a rule *nisi* accordingly, and for a new trial on the law and evidence, and admission of improper evidence.

In Trinity Term, *A. Wilson*, Q. C., shewed cause.

HAGARTY, J.—It is very difficult to find any authority directly bearing upon the effect of such words as are here used in a deed. It is quite probable that an English court has never been called upon to pronounce on the validity of a conveyance by one man to another, of his estate in the estate of another, without any local or other description whatsoever.

There is a vast mass of cases illustrating the meaning of the word “estate” in wills; nothing that I have as yet seen as to its use by itself in a deed. Preston on Estates, page 20. “The interest which any one hath in lands or any other subject of property is called his estate, and to this term some adjunct or expression must be added when the time for which the estate is to continue—as for years, for life, in tail or in fee; thus, it is said, a man hath an estate in fee, &c.” The usual definition of the word is “the interest which any one has in any lands, tenements or hereditaments. It signifies the situation, condition and circumstances of the owner with regard to his interest in the property, certain words being superadded to ascertain the specific and precise nature and quantity of such estate, in point of dura-

tion and the qualification attached thereto." Chitty on Descents, 16. "An estate imports the interest which a man hath in lands." Com. Dig. Estate A. 1, Co. Lit. 345. State or estate signifies such inheritance, freehold, term for years, tenancy by statute, merchant or staple, or elegit or in the like as any man hath in lands or tenements. Co. Lit., sec. 650. *Status dicitur a stando*, because it is fixed and permanent. It hath been adjudged on a special verdict that if one promise to give half his estate with his daughter in marriage, not only half of his goods and chattels, but also the half of his lands is included in the assumpsit." Per Twisden, J., cited *Bowman v. Milbanke*, Siderfin 191. Thus the word estate may be used to signify all kinds of property, but by the description of all the grantors, "plate, jewels and other estate," only his personal property will pass, yet if it be "other estate real and personal," then it is evident the word must be taken in the fullest extent. Burton on Real Property, 177. The same writer also says, "The degree of property which a person has in lands or tenements, if sufficiently perfect, is called his estate." Burton, 5. It has been long clearly settled that the words "all my estate," in a will, without words of inheritance, will pass the fee simple in testator's lands. In a case of a devise, Mr. Justice Buller says, "The word estate is the most general word that can be used, for so far from its being necessary to add words of inheritance to make it pass a fee, words of restraint must be added in order to carry a less estate, for it is *genus generalissimum*." 1 T. R. 411, *Holdfast v. Marten*. In a case often cited of *Hogan v. Jackson*, Camp. 299, Lord Mansfield says, "It is now clearly settled that the words 'all his estate,' will pass everything a man has; and in the same case, Buller, then at the bar, says, in arguing, 'the word estate is a technical legal expression and properly applicable to real estates.'" Again, Buller, J., says, "But here estate is used which, in its natural import, will carry a fee simple, unless there be words to control it." (*Doe Busby v. Woodhouse*, 4 T. R. 91.) Holt, C. J., says, "the word estate is *genus generalissimum*, and includes all things real and personal. In pleading a fee simple you say

no more than *seisitus in dominico suo ut de feodo*, and in *formedon* other action, if a fee simple be alleged, you say *cujus statum*, the demandant has now." Lady Bridgewater v. Duke of Bolton, 1 Salk. 236. ("Estates" have same operation; Fletcher v. Smiton, 2 T. R. 656.)

Holt, C. J., also held that devising all his estate, and all his estate in such a house, was the same, and that all his estate in the thing passed in either case. Ridout v. Payne, 1 Ves. 10; Tanner v. Wise, 3 P. W. 294; Macaree v. Tull, Ambler 181.

Sir William Grant, M. R., says, "The doctrine of modern cases, that where there is nothing to qualify the word estate, it will carry real as well as personal property, and the contrary intention ought to appear, to induce the court to put upon that word *a less signification than it naturally bears*." Barnes v. Patch, 8 Ves. 604.

In chapter 22 of Jarman on Wills, a large collection of cases on this point is given. 1 Jarman, 613 (1855). In introducing the subject, he uses these words, "we find many instances, especially among the early authorities, in which the word estate and other such terms, clearly capable, *viribus suis of comprehending real estate*, have been restrained by the context to personalty." Again, "a devise of a testator's estate, includes not only the corpus of the property, but the whole of his interest therein." 2 Jarman, 776.

Lord Hardwicke speaks of "all my estates" as in common mon parlance meaning a description of the lands. Gooduyn v. Goodwin, 1 Ves. 229. In Sanderson v. Dobson, 1 Ex. 148, the court speaks of "the absolute generality" of the word "estate." Doe Evans v. Evans, 9 A. & E. 719; Doe Evans v. Walker, 15 Q. B. 28; Sanderson v. Dobson, 1 Ex. 148.

In Mayor of Hamilton v. Hodson, on a Bermuda appeal to Privy Council (11 Jurist 193), Lord Brougham, in delivering a very elaborate judgment, says, "The word estate is *genus generalissimum*, and will, by its own proper force, without any proof *aliunde* of an intention to aid the construction, carry the realty as well as the personalty. * * The real meaning of the word estate is not *real estate*, but *real plus personal*. * * The testator uses the word estate most accurately to mean '*all my estate real and*

and personal.' Though he does not say real estate, he means it—the law means it for him and he means it." 2 Preston on Estates, 95. Mr. Preston, speaking of devises, says, "Estate is admitted to be sufficient to make a description, not only of the land, but of the interest in the land."

The rule for construing a deed, is given by C. J. Willes, (Willes, 327, quoted approvingly in Preston's edition of the Touchstone, page 88): "Whenever it is necessary to give an opinion upon the doubtful words of a deed, the first thing we ought to inquire into is, what was the intention of the parties? If the intent be as doubtful as the words, it will be of no assistance at all. But if the intent of the parties be plain and clear, we ought, if possible, to put such a construction on the doubtful words of the deed as will best answer the intention of the parties, and reject that construction which manifestly tends to overturn and destroy it. I admit that though the intent of the parties be never so clear, it cannot take place contrary to the rules of law, nor can we put words in a deed which are not there, nor put a construction on the words of the deed which are directly contrary to the plain sense of them. *But when the intent is plain and manifest, and the words doubtful and obscure*, it is the duty of the judges, and this is that *astutia* which is so much commended by Lord Hobart, page 227, in the case of Earl of Clanrickarde, to endeavour to find out such a meaning in the words as may best answer the intent of the parties." * * "It is said in our books that the construction of deeds ought to be favourable, and as near to the apparent intent of the parties as possibly may be, and as the law will permit. That too much regard is not to be had to the natural and proper signification of words and sentences, to prevent the simple intention of the parties from taking effect, *for that the law is not nice in grants.* * * He had collected these rules from Littleton, Plowden, Hobart and Finch—persons of the greatest authority."

It is to be observed that in devises, the majority of all the cases as to the word estate, arose from the absence of any words of inheritance, the presence of which would have generally removed all difficulty. Much legal criticism was deve-

loped in considering, whether the word referred to the testator's interest in property, or to a mere description of that property. It at least was considered, as Mr. Preston says, "sufficient to make a description not only of the land, but of the interest in the land." Where the word is in the plural, "estates," Lord Hardwicke considered that, in common parlance, it meant a description of the land.

Buller, J., and Holt, C. J., call estate "*nomen generalissimum*." It is worthy of note that the word "land" (which will, I presume, be quite sufficient to pass real estate in a deed,) is called by the same name in Coke on Litt. 4 A. "*Terra est nomen generalissimum et comprehendit omnes species terræ.*"

Applying C. J. Willes' cases of interpretation of deeds to the case before us, we see, I think, the intent of the parties plain—the grantor to divest himself in favour of grantee of the subject matter of the deed. Full words of inheritance are used as is customary in conveyances of real property. We are then (according to the rule) "to put such a construction upon the doubtful words of the deed, as will best answer the intention of the parties."

I apprehend, in the first place, it is not contended for defendant that it was necessary for the deed to particularise any land by local description, &c. Had it professed to convey grantor's estate in "all the lands, tenements and hereditaments which were of Garrett and Martin Miller," I presume the defendants would admit its sufficiency. If the words had been "all my right, interest and estate, of, in and to the estate real and personal of G. and M. Miller, &c.," would the heirs' interest in the lands have passed? My impression is that it would. Remove the two descriptive words real and personal from the sentence, and it remains such "estate" alone. If we enlarge that word by substituting for it Mr. Preston's definition, it will read "the interest which I have in the lands or other property of Garrett Miller or Martin Miller," or, in another form, "all my right, interest and estate of, in and to the interest which Garrett and Martin Miller have (or hath) in any lands or other property."

Coke's definition of the word "estate" is still stronger.

"State," or "estate" signifieth such inheritance, freehold, term, &c., or the like as any man hath in lands or tenements." If the word "estate" sufficiently designates the landed property of Garrett and Martin Miller, the deed at once fixes (as Preston hath it) "the term for which the estate is to continue," by the words, "to him the said Garrett Miller, his heirs and assigns for ever."

I have come to the opinion that, by the legal usage of centuries, whether in devises or elsewhere, the word "estate" has acquired an intrinsic meaning, including interests in landed as well as other property. That in popular phraseology, the estate of a deceased man is universally understood to mean his general property, real and personal—that popularly "a man's estates" would certainly be descriptive of his landed possessions. I consider that when a judge like Sir William Grant (although in a case of devise), *Barnes v. Patch*, 8 Ves. 604, said "Where there is nothing to qualify the word estate, it will carry real as well as personal estate, and the contrary intention ought to appear to induce the court to put upon that word *a less signification than it naturally bears.*" He considered that the word *ex proprio vigore* had such a natural meaning wherever found, and that Mr. Justice Buller regarded it in that light, when he said it was "a technical legal expression, and properly applicable to real estates." Lord Holt's example of the word when used in pleading, shews how he regarded it apart from its position in a devise.

Once it is conceded or established that the word has of itself such a general and popular signification, we must, I think, arrive at the conclusion that in this case the deed in question means to pass and does pass *something*, and that that something must be "the estate, real and personal," lands and tenements of Garrett and Martin Miller.

It was also objected that "the estate of Garrett Miller and Martin Miller" only means the joint estate of these two.

In *Shepherd's Touchstone*, page 90, it is said, "When a man doth grant all his lands or all his goods, by this grant doth pass not only what he is sole seised or possessed of, but also what he is jointly seised or possessed of with another, as far as respects his share." "*Qui omne dicit, nihil*

exceptit," and so *è converso*. "If two men join together and grant all their lands or all their goods, hereby do pass not only all they have jointly and together, but all those they have sole and apart." * * "When a man grants all his goods and chattels, not only those pass wherein he is jointly possessed with another as an obligation wherein he is joint obligee, but those also which he is possessed of in right of another, as a term of years he has in right of his wife, or goods which he has as executor." Rolle Ab. 58, Grant X. It appears to me that, on the same principle, if a man grant all he hath in the estate of A. & B., the fact of his having nothing in B.'s estate, will not prevent his grantee taking what he hath in A.'s estate.

I have, therefore, arrived at the conclusion that the deed in question is so worded as to pass Robert Miller's estate in the lands to Garrett Miller the grantee.

GRANT, ADMINISTRATRIX, v. THE GREAT WESTERN RAILWAY COMPANY.

Appeal—Proceedings in.

Upon an action to stay the proceedings in appeal, on the ground of irregularity,
The court refused to make the rule absolute, although no notice of the grounds of appeal had been served or formal leave to appeal asked, all parties having understood the case would be appealed.

In Trinity Term, *Start* obtained a rule *nisi*, calling on the defendants to shew cause why the stay of proceedings upon the execution in the sheriff's hands in this cause should not be rescinded, on the ground that the same is not warranted by the proceedings in error and appeal; that the notice of the grounds of appeal had not been served on the plaintiff, and also on the ground of delay in prosecuting the appeal.

In Hilary Term last, and on the 6th of February, the rule moved for by defendants for a new trial was discharged. On the 11th of February, notice of the intention to appeal was served on the plaintiff's attorney. A notice of application to a judge for the allowance of the bond in appeal was also served. The notice contained the names of the sureties, and stated that the application was to be made on

the 26th of February. Final judgment was entered on the 11th day of February, and execution placed in the sheriff's hands. On the 19th of February, *McLean*, J., granted an order, staying proceedings on the judgment and execution until the 26th of the same month, and until such time thereafter, as an order should be made, allowing the bond for security in the appeal pending between the parties. On the 27th of February he gave a further order staying the execution pursuant to the statute, the security having been perfected and allowed. On the 17th of February, the case in appeal was served on the plaintiff's attorney, and on the 27th it was settled by *Hagarty*, J., the parties not being able to agree on it. It does not appear that notice of the grounds on which the defendants appeal, or intend to rely in appeal, have been served on the plaintiff's attorney.

During the term, *M. C. Cameron*, for defendants, shewed cause. He stated that the plaintiff's attorney had in fact been notified of the grounds of appeal, and if he wanted them in a more formal manner he could have demanded them, and if refused, the appeal, by rule No. 21 of the court of appeal, might be dismissed by that court with costs. As to the delay in bringing the case to argument, the reason was, that certain reports in the ecclesiastical courts in England, the absence of which from the library, the judges have complained of, had been sent for, and had not arrived, and it was not deemed advisable to argue on the case until they could be referred to. If plaintiff had desired to bring the case on, she could have taken proper steps to have had the grounds of appeal and answers filed, and then the cause could have been set down for argument by her under rule No. 23 of the court of appeal. That the plaintiff had shewn no grounds for interference by this court, and the case having properly gone to the court of appeals, if not pursued there according to the practice, that court was the proper place to apply for a remedy. As to the ground that there can be no *supersedeas* of an execution until notice of the grounds of appeal shall be served, the 22nd section of the provincial statute, 20 Vic., ch. 5, declares that proceedings in appeal shall be deemed a *supersedeas* of execution from the perfecting and

allowance of the security required. That the statute being subsequent to rule No. 27 of the court of appeal, must prevail. That the grounds of appeal cannot be considered as frivolous, as they bring up the point which this court had so much difficulty in deciding, viz., whether the surrogate court could legally grant letters of administration to the estate of a person resident in a foreign country, dying here in *itinere*, having goods with him of less value than £5, and all the judges of this court thought it a fit case to go into appeal.

Start contra, urged that under the rule No. 27, of the court of appeal, the writ of appeal could not be a supersedeas of execution, until the allowance thereof, containing some grounds of appeal intended to be argued, had been served. That, construing the rule with the statute, the proceedings in appeal properly taken under the rules of court were to be considered a supersedeas of execution, only from the time of service of the grounds of appeal, for both statute and rules of court provided if the court or a judge think the grounds frivolous they may order execution to issue. That the delay to bring the case before the court of appeal ought to induce this court to remove the stay of execution. That the judgment of this court on the point in issue, is clear and conclusive, and as no leave was given to appeal, it ought to be considered that the grounds suggested are frivolous, and therefore the execution ought not to be interfered with.

RICHARDS, J., delivered the judgment of the court.

I cannot consider this appeal frivolous, for all the judges of this court were of opinion at the time judgment was pronounced that the case ought to go to the court of appeal; no express leave was given to appeal, as it was not asked for. But all parties seem to have taken it for granted that it would be appealed, and plaintiff having taken such steps in the matter as now prevents her from setting up here the alleged want of leave to appeal, as to the delay in prosecuting the appeal, that is a matter that must be disposed of by the court of appeal. It seems, however, that plaintiff could, if she had thought proper, have taken such steps, under the rule refer-

red to by Mr. Cameron, as would have brought the case before the court of appeal, so that it might have been heard without delay.

As to the necessity of stating some ground of appeal, intended to be argued, before the same should operate as a *supersedeas* of execution.

Rule No. 20 of the court of appeal, framed under the statute 12 Vic., ch. 63, provides that no rule to assign causes of appeal shall be necessary, in order to compel assignment of errors.

No. 21. If the appellant does not, in eight days after the filing of the return of the writ of appeal, *file* or *serve* a copy of his *grounds of appeal*, the respondent may demand the same in writing, and if the grounds of appeal are not filed within eight days after service of the demand, the appeal, on proof thereof, shall be dismissed *with costs*.

No. 23. When the grounds of appeal and answers are filed, the cause shall be set down for argument *on the application of either party*.

No. 27. *No writ of appeal* shall be a *supersedeas of execution* until *service of the notice of the allowance thereof*, containing a statement of some particular ground of appeal intended to be argued: provided that if the error stated in such notice shall appear to be frivolous, the court, or a judge upon summons, may order execution to issue.

By provincial statute 20 Vic., cap. 5, passed after the foregoing rules were made, it is enacted by sec. 20, that "a writ of error and appeal shall not be necessary or used, and the proceeding to appeal shall be a step in the cause."

Sec. 21 provides that either party alleging errors in law, may deliver to the clerk of the crown a memorandum in writing according to form No. 1, to the act, whereupon the clerk shall file such memorandum, and deliver to the party a note of the receipt of the same, and a copy of such note, together with a statement of the grounds of error intended to be argued, which may be served on the opposite party.

Sec. 22. Proceedings in any appeal from decisions in the courts of common law, *shall be deemed a supersedeas of execution from the time of the perfecting and allowance of*

the security required by sec. 40 of 12 Vic., cap. 63, with a proviso similar to that contained in the 27th rule of the Court of Appeal above referred to.

Sec. 24. Roll to be made up, and suggestion to be served by appellant, within ten days after service of the note of the receipt of the memorandum alleging error, and in default thereof, *or of an assignment of error*, respondent shall be at liberty to sign judgment of *non pros*. As the statute was passed since the rules of the court of appeal were framed, there can be no doubt that its provisions must prevail when the rules or the statute conflict. The 22nd section seems to me to declare expressly, that the proceedings in appeal shall be a *supersedeas* of the execution from the perfecting and allowance of the security required, and this having been done on the 27th of February, the proceedings on the execution are properly stayed from that day. I see no necessity of resorting to extraordinary rules of construction to do away with the plain language of the section of the act. If a respondent is not aware of the appellant's grounds of appeal, and desires to ascertain them, the statute or rules of the court of appeal afford him ample means of obtaining them, or of depriving the party of his remedy in that court, if he refuses to furnish them. On the whole, I see no grounds on which we can make this rule absolute, and it must therefore be discharged.

THE CANADA PERMANENT BUILDING AND SAVINGS SOCIETY V. LEWIS ET AL.

Building Societies—Their right to take collateral securities from strangers—Bond.

Held, that the recitals in a bond do not limit the condition, so that an action cannot be brought, except for a breach which clearly comes within the meaning of the recital.

Held also, that building societies, under their acts of incorporation, are not entitled to take any, but real property security; and cannot take collateral security for the payment of loans made upon real property.

DECLARATION on a bond, dated the 4th of June, 1855, in the penalty of £800, executed by defendants; which recited that the above bounden Lewis, by indenture of mortgage, bearing date the 4th of June, 1855, mortgaged to the plaintiffs

certain premises being held by said Lewis by lease, (renewable upon certain conditions,) from the Rev. Henry Cholwell Cooper, rector of Christ's church, Mimico, for ninety-one years, and that certain doubts had arisen whether the said Rev. H. C. Cooper was authorised to give such a lease.

The condition being that the obligors "shall and will indemnify, and save harmless, the plaintiffs and their assigns, from all loss or damage which they may at any time sustain or be put to, by reason of the said indenture of lease, from the said Rev. H. C. Cooper to the said Lewis, turning out invalid or defective from any reason whatever, or for any loss or damage which the said society, or its assigns, may be put to or sustain by reason of the non-payment of the several monthly payments, or any of them, in the proviso of the recited indenture of mortgage contained, or by reason of the non-performance of any of the covenants in the said indenture of mortgage contained, then this obligation to be void."

At the trial before *Draper, C. J.*, at the spring assizes, at Whitby, evidence was given of default made by Lewis in his mortgage, and a verdict was taken by consent for £309 3s. 4d., subject to the opinion of the court on two points.

1st. Could the plaintiffs lawfully take a bond from a stranger to secure the payments covenanted to be made by a shareholder in their society, on a mortgage made by him to secure repayment of a loan, with interest, at a rate exceeding six per cent.

2nd. Is the condition of the bond so limited by the recital therein, that it will not be forfeited by a breach of the conditions in a matter beyond, and *dehors* the recital.

The case was argued in Easter term, by *E. C. Jones* for the plaintiffs, and *H. Cameron* for the defendants.

The authorities cited were: 2 Wm. S. 402 A, and 415 B; *Pearsall v. Sommersett*, 4 Taunt. 593; *Liverpool Waterworks v. Atkinson*, 6 East. 507; *Doe Meyrick v. Meyrick*, 2 Tyr 178; *Carpenter v. Buller*, 8 M. & W. 209.

DRAPER, C. J., delivered the judgment of the court.

As to the second question, I am of opinion that the recital

does not so override and restrain the condition, as to render void and nugatory that part of it, the breach of which is the foundation of this suit. The various authorities on this point seem to me to resolve themselves into determining that the intention of the parties, as expressed in the whole instrument, shall govern, and that when the court can clearly gather that intention, they will construe the condition accordingly, and that it shall be restrained by the recital for that purpose. Such is Lord *Ellenborough's* exposition of the law in *Parker v. Wise* (6 M. & S. 247). He observes that all the cases from *Lord Arlington v. Merrick*, downwards, agree that the condition shall be taken with reference to the recital, and may be explained and restrained by it. "But all this imports that *it is to be gathered from the recital that the intention of the parties requires the condition should be qualified.*" And in *Comyn's Digest*, Parols A. 19, it is said, "a recital does not confine subsequent words by which the intent appears more large; as if a condition of an obligation recites, that whereas a ship is bound to A., and is to return to the port of B., or London, or any port in England; then that obligor shall pay £20 after the next return to the port of B., or L., or other port of England, or elsewhere where she makes her right discharge; if she makes a discharge at Venice he ought to pay."

I have felt more difficulty with the first point. The argument for the plaintiff was that the statutes 9 Vic., ch. 90, and 13 & 14 Vic., ch. 79, make legal such a transaction as that between the plaintiffs and Lewis, in the loan to him, and the mortgage given by him to secure its repayment, with interest, fines, forfeitures, &c., &c.; and then it is said that the plaintiffs have a common law right to take an indemnity bond against losses from his neglect or default in nonfulfilment of his engagement.

It was explained at the trial that the system pursued was this: the sum to be loaned being fixed, the interest at the rate of seven per cent. per annum is calculated upon it, and principle and interest are added together, and the amount is divided into sixty monthly payments, subject to fines for want of regularity in payment; and to a provision that if

these payments fall six months in arrear, the whole sum secured and remaining unpaid shall become presently payable, and it is for the balance so remaining unpaid, though the time fixed in the mortgage for payment of a large part has not arrived, that this action is brought. It is plain, then, that the sum sought to be recovered includes seven per cent. per annum interest, and that a part of the sum demanded is interest at that rate, for a period of time which in fact has not elapsed.

The 2nd section of the 9th Vic., ch. 90, makes it lawful for these societies to recover from their members such sums of money, by way of bonus on these shares, for the privilege of receiving the same in advance prior to the same being realized, besides interest for the shares received, without being subject to any forfeiture or penalty for usury.

The 13th & 14th Vic., ch. 70, declares that these societies have power to loan money on the security of real estate to their members, "on the same conditions, and with the same privileges in all respects as any other real estate," by the two acts authorised or required to be assigned, mortgaged or transferred.

By these provisions, it appears that the society may, on loans advanced in the manner usual with them, on security of real estate to their members, receive by way of bonus a larger sum than the rate of interest fixed by law. This privilege is, I think, limited to dealings with their own members, on the security of real estate, the property of such members, and does not authorise loans on any such conditions to parties not members, or to members, except on the security of landed property.

It is admitted the statutes do not authorise the plaintiffs to take personal security from strangers as a collateral security for the fulfilment of the covenants and conditions of a mortgage entered into by a member. This power is claimed at common law. The argument of the plaintiffs' counsel has failed to convince me that this is the correct conclusion.

The whole system of advances and loans in both acts, is plainly expressed to be based on real security, and not upon personal, which latter is never once alluded to, and the

transactions are throughout treated as between the societies and their members, not between them and strangers; and the authorities, privileges, and immunities, are granted in reference to those transactions.

To hold that they could take personal security from strangers for the fulfilment of covenants from members for these payments, would, it appears to me, give an opportunity to change the character of these societies, and would open a door to great possible abuse; for there is nothing in the statute which regulates any proportion between the value of the estate mortgaged, and the sum advanced, and upon the strength of personal security a large sum might be advanced at a high rate of bonus on real estate of trifling value, and the society might in effect become money lenders, without the restriction imposed by law as to the rate of interest; and money lenders in truth (though not nominally) to parties not members.

It may be quite true, that any and every such transaction, which should be merely colourable to evade the usuary laws, would fail of the desired effect; but I do not think this removes the objection to giving the statutes a construction which would render such transactions possible.

The statute 16 Vic., ch. 80, sec. 2, made the law as to usury different from what it was when the incorporation of building societies was sanctioned by the legislature, and may be considered as in part at least meeting the difficulty, by enacting that every such contract, (*i. e.*, for a rate of interest over six per cent.,) and every security for the same shall be void so far, and so far only, as relates to any excess of interest thereby made payable above six per cent. The very language of the act proves that the reservation of interest was assumed to appear on the face of the contract by which it was reserved; and so that the difference between that and six per cent. could at once be ascertained. But here neither the mortgage nor the condition of the bond refer to any specific rate of interest. How the parties are to ascertain, in a transaction so peculiar as these building society transactions are, how much the money to be paid includes above the legal rate of interest, does not so readily appear. There

are many contingencies involved which may render it difficult, if not impossible, to distinguish for how much the security would be void, though it clearly did secure more than six per cent.

But independently of this difficulty, I look upon these societies as the creatures of the statutes, incorporated for a particular purpose, to carry on a particular business, and under particular limitations as to the securities they may take, or the loans they may grant. Every member of the society has a direct interest that the loans and securities shall be strictly within the provisions of the acts, and I think that the courts are bound to restrain their dealings within the limits presented by the legislature. I think the acts plainly intend that the dealings of the society shall be confined to its members, and the securities taken by the society must be such, and such only, as the statute authorises, and I see nothing to authorise taking personal security from a third party. A member may, I presume, besides giving his mortgage, give his covenant also, and if his covenant his bond, though not within the letter of this act, the real security being indispensable.

I do not mean to say that personal security, by bond or otherwise, may not be taken for the goodness of title of lands mortgaged to the society—the objection is to such security being permitted to be taken for the payment of the loans and interest.

Upon the whole, I have arrived at the conclusion, that this action is not maintainable as against the defendant Rowell, and that our judgment should be in his favour. The only breach assigned, is the nonpayment by Lewis of the monthly payments of the loan of £400 and interest; claiming these payments, which have not in point of time fallen due, but are due by way of forfeiture, or rather acceleration, and the interest upon them, as if the forbearance and loan had extended over the whole term originally stipulated for.

I think, therefore, the verdict should be entered for defendant Rowell.

See *Cutbill v. Kingdom*, 1 Exch. 494; *Mosly v. Baker*,

6 Hare 87 ; Lord Arlington v. Merrick, 2 Sand. 411 ; Liverpool Water Works Company v. Atkinson, 6 Ea. 507 ; Sansom v. Bell, 2 Camp. 39 ; Parker v. Wise, 6 M. & S. p. 247 ; Ingleby v. Swift, 10 Bing. 84.

THE MUNICIPAL COUNCIL OF THE COUNTY OF WELLINGTON
v. THE MUNICIPALITY OF THE TOWNSHIP OF WATERLOO.

Municipal corporation—Statute 14 & 15 Vic., ch. 5.

Held, that the Township of Waterloo was liable under the statute 14 & 15 Vic., ch. 5, for its share of the debts of the Guelph and Dundas road incurred by the County of Waterloo, (of which it formed one township,) while that county was united to the Counties of Wellington and Grey ; notwithstanding, too, that an arbitration took place between those counties upon their separation by which it was determined that "Wellington" should assume the liability of the former joint counties.

Held, also, that interest, or the ascertained debt, was recoverable, it being not interest upon interest, but interest on money paid, or to be paid, for the defendants.

The declaration set forth that the District of Wellington, under the 8th Vic., ch 7, contained certain townships, including the Township of Waterloo, which District of Wellington, together with the Township of Erin, was, by 12 Vic., ch. 78, declared to be the County of Waterloo, and to such county were transferred the judicial and other rights, officers, courts, institutions, &c., which had belonged to the District of Wellington.

Then, by 14 & 15 Vic., ch. 5, the County of Waterloo was divided into three counties, Waterloo, Wellington, and Grey, which constituted a union of counties, of which Wellington was the elder county. By the 8th section of this act, the Townships of Waterloo, Wilmot, Wellesly, and Woolwich, which constituted the County of Waterloo, were expressly made liable for their share of the debt incurred, or to be incurred, for the construction of the Guelph and Dundas road, in proportion to their respective assessments for the year 1848, relatively to the assessments of the other portions of the District of Wellington, and were given a lien on the road for any amount they may be obliged to pay on that account ; any other questions affecting the other debts of the District of Wellington, the County of Waterloo, and the

new County of Wellington to be settled in the manner provided by law (14 & 15 Vic., ch. 5, and 12 Vic., ch. 78.)

The County of Waterloo, as newly constituted, was soon after separated from the union of the Counties of Waterloo, Wellington and Grey.

After this separation, the united Counties of Wellington and Grey paid a portion of the debt contracted for the Guelph and Dundas road, and subsequently to this payment the union between the Counties of Wellington and Grey was dissolved, and by agreement between these counties it was settled that the debt and debentures for which those counties were liable in respect of this road should be exclusively assumed by the County of Wellington, and that all moneys which had been paid by those counties on that account should be treated as the moneys of the County of Wellington, which county should also be entitled to receive and recover all moneys due from other parties in respect of the payments made for that road.

Since this last-mentioned separation, the County of Wellington (the plaintiffs) has paid a further sum of money on account of the debt and debentures issued for the Guelph and Dundas road. And the Counties of Wellington and Grey, after the separation of the County of Waterloo, became liable for the payment of a large sum on the same account.

That the defendants were liable, according to the proportions fixed by the act 14 & 15 Vic., ch. 5, to pay a portion of the several sums so paid by the united Counties of Wellington and Grey, and by the County of Wellington, and also of the debt, for which the Counties of Wellington and Grey so became liable, and have been requested to pay the same, but have hitherto wholly refused.

To this declaration the defendants pleaded, (admitting that under the act 14 & 15 Vic., ch. 5, they were to be responsible for a share of the debt incurred for the construction of this road, and that the debt sought to be recovered in this action is part thereof,) that before the County of Waterloo was set apart, there was an arbitration between

that county and the Counties of Wellington and Grey, for the adjustment of the proportion of any debt due by the united Counties of Waterloo, Wellington and Grey, and which the County of Waterloo ought to assume and pay, (and for determining the amount due for the Guelph and Dundas road debt according to the assessment rolls of 1848,) whereby it was awarded that the County of Waterloo should be relieved from the payment of all debts except the Guelph and Dundas road debt, for a proportion of which this action is brought, and which, by the award, was determined at the sum of £3819, estimated on the basis of the comparative assessment of 1848, to be paid by the County of Waterloo as the debentures issued on account of the Guelph and Dundas road should mature.

To this plea the plaintiffs demurred, because,

1st. The County of Waterloo was not liable for the moneys claimed.

2nd. No reason is given why defendants should not pay it.

3rd. That the award pleaded was contrary to the act 14 & 15 Vic., ch. 5.

4th. That the plea sets up a different liability from that created by the act.

5th. That the plea shews that the money claimed in the declaration was not adjudicated upon or settled by the award.

6th. That the plea amounts to "never indebted," and sets forth only matter of evidence.

A. Wilson, Q. C., for plaintiffs, cited *Municipality of North Dumfries v. The Municipality of Waterloo*, 12 Q. B. U. C. 507.

Irving, for defendants on demurrer.

A. Wilson, Q. C., for plaintiffs, and *M. C. Cameron*, for defendants, argued the rules.

DRAPER, C. J., delivered the judgment of the court.

I think the plea is substantially bad for two reasons: first.—Conceding that it shews that the plaintiffs have, by submission to arbitration and award in their favour, acquired

a right of action against the County of Waterloo, (a point which does not arise in this case,) it does not shew that such award was intended to, or could operate as a discharge of the defendants from their liability to pay this debt, or, second.—If it can be looked upon as setting up the award between the Counties of Wellington and Waterloo, as discharging the defendants from their separate liability as a township, by its becoming merged in the joint liability of all the townships composing the County of Waterloo, their plea in effect treats the award as overruling the statute, and relieving the defendants from a debt to which that act expressly subjects them.

The same plaintiffs have also a similar action pending before us against the Township of Woolwich, in which the pleadings are similar, and the plaintiffs have demurred. The judgment just given disposes of this case likewise.

These cases were brought down to trial at the last spring assizes at Guelph, before *Hagarty J.* In the first the plaintiff got a verdict for £1,627 16s. 6d., and in Easter Term, *A. Wilson*, Q. C., obtained a rule *nisi* on leave reserved to increase the verdict by the sum of £73 15s. 5d., while *M. C. Cameron*, for the defendants, obtained a rule *nisi* to enter a nonsuit, or to reduce the verdict to the sum of £1,496 6s. 1d., leave having been reserved for both motions.

In the action against the Township of Woolwich, similar rules were granted for the plaintiffs to increase the verdict by £18 4s., the damages assessed by the jury being £397 3s. 10d., and for the defendants to enter a nonsuit, or to reduce the verdict to the sum of £365 6s. 5d.

The objections taken at the trial were,

1st. That this action is not maintainable at all.

2nd. That the by-laws of the District of Wellington under which the debts were contracted were invalid, and consequently the different counties, collectively or separately, were not liable, and if not, neither were these townships.

3rd. That there should have been a special rate levied for this special purpose, and that a payment out of the general funds of the county of this debt, or any portion

thereof, is not a payment for any portion of which the defendants are liable.

4th. That defendants were only responsible for actual payments by the county council, and not for what remains due by them.

5th. That the award put in, (that pleaded,) is a defence and relieves the defendants.

It was agreed a verdict should pass for £1627 16s. 6d., being the defendants' portion of the whole principal of the debt and interest thereon, paid and unpaid, but due to the plaintiffs, and which they are liable to pay, with leave to the plaintiffs to move to increase by adding items for interest upon interest, which they have paid or have to pay, and with leave to defendants to move to enter a nonsuit or verdict for defendants on the objections taken, or to reduce the verdict by the amounts due, but not actually paid.

The several sums to be added or deducted appeared in the evidence. It also appeared that the payments actually made were out of moneys in the county treasury applicable to general purposes, and not raised specifically to discharge this debt.

Two similar actions, involving the same questions, were brought in the court of Queen's Bench. Mr. Wilson mentioned during his argument that judgment had been given for the plaintiffs, and M. C. Cameron gave up every point which he had raised except the right of the plaintiff to maintain this action against the defendants.

The liability of the Townships of Waterloo, Wilmot, Wellesly and Woolwich, for an ascertainable portion of the debt incurred for the construction of the Guelph and Dundas road, is indisputably fixed by the 8th section of 14 & 15 Vic., ch. 5. The liability of the County of Wellington to pay the parties who are creditors in respect of that debt, as bond or debenture holders or otherwise, is also clear. It is either the result of the 6th section of that act, and of the 7th or 15th sections of the former act, 12 Vic., ch. 78, where the portion of a debt due by the union of the counties which is to be paid by the junior county is settled in manner pointed out by the act, it became a debt due by the younger

to the elder county. Left to these provisions, it would have in this case been a debt due by the County of Waterloo to the County of Wellington and Grey, or the County of Wellington alone since the dissolution of the union between Wellington and Grey. But the legislature, by sec. 8, expressly fixed the liability as to a proportion of the debt on four townships, which, with the Township of North Dumfries, formed the County of Waterloo under that same act.

When the legislature made these four townships debtors, they must be taken to refer, not to the territory or land included within the limit of each township, but the inhabitants thereof, who were a corporation under section 1 of 12 Vic., ch. 81, and as such corporation were liable to sue and be sued, &c., &c., and were to exercise all their corporate powers through and in the name of the municipality of such township. I think the act makes the debt due by the corporation, and therefore, that in an action to enforce it, the municipality of the township are properly made defendants.

But it is further insisted, that though responsible for a portion of the debt incurred for the construction of the Guelph and Dundas road, the only consequence is, that a rate may be levied to raise the necessary amount, and that the act gives no power to the County of Wellington to bring an action to recover it. But if it be true (as I take it to be) that the debt so incurred is one for the whole of which the County of Wellington is responsible (less what that county and the united Counties of Wellington and Grey have paid) to the creditors with whom it was incurred, then primarily the County of Wellington is liable to pay, and has partly paid, a debt for a portion of which the statute makes the defendants liable; and it appears to me a necessary legal consequence that the defendants, who are responsible for a part of the debt, must be responsible to those by whom it must be, and has so far, been paid. And this conclusion is to some extent sustained by the fact that the legislature, where the question is between an elder and a younger county, has made any part of a debt incurred before a dissolution of the union, which, on the dissolution, is to be borne by the younger county, a debt due

by the latter to the elder county. I think, therefore, the present plaintiffs are entitled to maintain this action.

As to the other points in the case, I need say no more than that I think the plaintiffs are entitled to increase of their verdict pursuant to the leave reserved. It is not, properly speaking, interest upon interest they are recovering, but interest upon moneys they had paid, or must pay, to discharge interest due on the debentures issued for this road.

Judgment for plaintiffs.

COATSWORTH v. THE CITY OF TORONTO.

For the facts of this case, see Common Please Reports, vol. VII.

The new trial granted having again resulted in a verdict for the plaintiffs, the court ordered another.

Adam Wilson, Q. C., for plaintiff.

J. H. Cameron, Q. C., for defendants.

DRAPER, C. J., delivered the judgment of the court.

The new trial granted in Hilary Term last has resulted in another verdict for the plaintiff, against the charge of the learned judge who tried it. The evidence given was not materially different from that given at former trials, though the plaintiff endeavoured to press on the jury that Thomas Garlick, who was at that time employed by the defendants, was an officer appointed to superintend the work, and perhaps persuaded the jury that, because he gave evidence favourable to the plaintiff, that should be deemed a compliance with the terms of the contract, that the work should be done thoroughly and faithfully according to the specifications and to the entire satisfaction of the chairman of the Board of Works, or of the officer appointed to superintend the said works.

It has been argued on the part of the plaintiff that there is a distinction between cases where a certificate is by the terms of the contract necessary to entitle the contractor to be paid for his work, and those in which the work is to be done to the satisfaction of the engineer, or some other person named in the contract. That in the first case it is a condition precedent, but in the last, if reasonable evidence is offered, which, in the opinion of the jury, ought to satisfy

the parties to whose satisfaction the thing is to be done, they have not an arbitrary authority to reject the evidence and say they are not satisfied. The following cases were cited : Moore v. Woolsey, 4 E. & B. 243 ; Bryant v. Flight, 5 M. & W. 114 ; Milner v. Field, 5 Exch. 829 ; Grafton v. The Eastern Counties Railway Company, 8 Exch. 699 ; Dallman v. King, 4 Bing. N. C. 105 ; Morgan v. Birnie, 9 Bing. 672 ; Moffatt v. Dickson, 13 C. B. 543 ; Scott v. Avery, 2 Jur. N. S. 815 ; Scott v. Corporation of Liverpool, 4 Jur. N. S. 402.

I have examined them all, but I do not find that the facts of the present case bring it at all within the principle of Moore v. Woolsey, or cases of that description. It appears to me to come strictly within the decision in Grafton v. The Eastern Counties Railway. The work must be performed to the satisfaction of the officer, if there be one, and the evidence shews that he not only was not satisfied, but he proves that it would require an expenditure equal to, or exceeding the verdict last given to make those repairs which he deemed indispensable.

As I had occasion to remark in giving judgment on a former occasion in this case, and during the present argument, I really believe his conduct in formally demanding an amount of work to be done so very much greater than he admits would have satisfied him, has greatly prejudiced the defence, and may continue to do so. It is, however, so clear to me that the verdict is mistaken, that the jury have overlooked the contract the parties to this cause made, and are substituting their opinion of what should have been for that which the contract otherwise determines, that I cannot feel it right to allow the verdict to stand.

Rule absolute.

LYALL V. THE MAYOR, ALDERMEN, AND COMMONALTY
OF THE CITY OF LONDON.

Debt—Interest—Debentures.

Held, that an action in *debt* is not maintainable for interest *only* on debentures, the principal not being due.

There were twenty-eight counts in the declaration, in form and substance like the first, being for interest on other debentures of a similar character to that set out in the first

count. The introductory part of the declaration concludes with the statement, "and the plaintiff demands of the defendants the sum of £540, which they owe to, and unjustly detain from him." The first count then states: "That on the 2nd of October, 1854, by a debenture or writing obligatory, sealed with the seal of the defendants, they did covenant and agree to pay to the bearer thereof £3750, on the 2nd of October, 1874, and interest at the rate of six per cent. per annum, half yearly, on the 2nd of April and the 2nd of October in every year, until the said 2nd of October, 1874, at the office of the treasurer of the defendants in London; that the said debenture was issued by defendants under all the formalities required by law for the issuing of debentures by a municipal corporation; that plaintiff, before and at the time of the accruing due of the interest hereinafter mentioned, and from thence until at and after the commencement of this suit, was holder of the said debenture, and as such entitled to the interest, and being such holder, £112 10s. for the half year's interest on the £3750 became due and payable at the office of the said treasurer on the 2nd of April, 1855; and plaintiff on that day demanded payment at the said office. Yet defendants did not then or since pay the same or any part thereof, and the same remains wholly due and unpaid.

The 29th count was, that the defendants on the 1st of April were indebted to the plaintiff in £540, for money due on an account stated between them, whereby and by reason of the non-payment thereof an action hath accrued to the plaintiff to demand and have from the defendants the said several moneys respectively, amounting to the said sum £540, being the said sum above demanded.

The aggregate amount claimed in the first twenty-eight counts is £540. The damages are laid at £50.

Pleas to all the counts except the last were,

1st. That the several debentures or writings obligatory were not the deeds of the defendants.

2nd. That plaintiff was not at the time of the accruing of the interest on the several debentures the holder thereof, or of any or either of them.

3rd. That plaintiff did not demand payment of the interest

due on the said several debentures, or any or either of them, at the said office of the treasurer of defendants in London, *modo et formâ*.

Plea to the last count, never indebted.

Replication taking issue on the first and fourth pleas.

Demurrer to the 2nd plea. Causes: that it contained no answer to the several counts which it proposes to answer; that defendants cannot answer several counts of that nature by one plea, when the defence may require distinct replication: that it is not sufficient to deny that plaintiff was the holder when the interest accrued, without also denying that he was the holder at the commencement of the suit, or then entitled to recover the interest, or when it accrued due, or shewing a liability to pay some other person, or that it has been paid before the commencement of the suit.

Demurrer to third plea. Causes: that it offered an immaterial issue: that by the debentures the defendants were bound to have the interest *ready at the day* at the treasurer's office, and that plaintiff was not bound to demand the same on the day, or at any day before suit; that defendants can only excuse themselves by averring a readiness to pay the interest at the place named, but that the debentures were not presented for such payment, or that it was paid; that it is uncertain whether defendants mean to deny demand at the place on the day when it was due, or that it was ever demanded at the place.

Exception to the declaration.—That plaintiff sued in debt instead of covenant: that declaration shewed no privity between plaintiffs and defendant, and no consideration money from plaintiff to defendants: that it should be averred plaintiff was the original holder or bearer of said debentures: that declaration discloses in each count a covenant to pay a certain sum at a certain time, with interest, which interest was to be paid by instalments half yearly, and an action of debt will not lie on such covenant until the whole sum is due.

J. H. Cameron, Q. C., for plaintiff, cited *Milles v. Milles*, 2 Crok's Chs. 241-2; Com. Dig. 390, 391.

M. C. Cameron, for defendant, cited *Forsyth v. French*, Hilary term, 3 Vic.; *Rudder v. Prince*, 1 H. Bl. 547; *Rhodes v. Gent*, 5 B. & Al. 244.

DRAPER, C. J., delivered the judgment of the court.

I do not see how it is possible to hold that these counts on the different debentures are not in debt. The plaintiff begins by demanding £540, which he says the defendants owe to, and unjustly detain from him; and he concludes by stating that an action hath accrued to him to demand and have of and from the defendants, the said several sums of money respectively, amounting to the sum of £540, *being the said sum above demanded.*

It is true the pleader has demanded, by the twenty more counts, exactly double the sum of £540, for the interest demanded on the several counts amounts to £540, and the account stated is for the same sum; but this does not affect the question, though the conclusion may be objectionable on special demurrer.

It was not argued by the plaintiff's counsel that, if the count were in debt, they could be upheld against the general rule, that an action of debt cannot be maintained where the money to be paid is a gross sum, payable by instalments, falling due at different times, until the last day of payment has arrived, and default is made. As is pointed out by Lord *Loughborough* in *Rudder v. Price* (1 H. Bl. 547), the distinction is merely verbal, and consists in form between a contract to pay five sums of £20 on five different days, and a contract to pay £100 by five sums of £20 on different days; but he concludes, "the authorities are too strong to be resisted."

The rule was recognised and acted upon in this province in *Forsyth et al. v. Johnson et al.* (6 Old Series, 97), in which I was counsel at the trial for the defendants, and the court of Queen's Bench held that debt would not lie for the first instalment of a mortgage before the others are due.

I should have been glad to find that each sum of the half yearly interest might have been treated by the terms of the debentures as a separate sum contracted to be paid by itself. In *Coates v. Hewit* (1 Wills. 80), where the action was debt on bond, with condition for the payment of £5 on the first of August, 1742, £5 more on the first of August, 1743, and £5 more on the first of August 1744, and the action was

begun before the last day of payment arrived, the court held it maintainable, because the bond was forfeited by the non-payment of the first sum, and therefore the debt, *i. e.*, the sum for which the bond was given, was presently due. The penalty, in other words, was the debt, and became due on the first breach.

That principle is inapplicable here, and I find no authority for holding that interest on a debt certain, contracted to be paid at fixed days, before the debt itself is to fall due, can be treated as becoming a separate and distinct debt, payable on each of such days, and recoverable in an action of debt, though I confess I cannot frame to my own mind a satisfactory and convincing reason why it should not; I suppose it must be, that it is one contract to pay one sum, with interest, and that there can only be one action of debt on one contract, and the interest is regarded as inseparably connected with the debt, though payable from time to time before the debt falls due. It cannot be as damages;—first, because it is an actual term of the contract. Secondly, because there can be no damages for detaining until the debt itself has become payable and is unpaid. But why the agreement to pay a sum certain, or capable of being made certain by computation, half-yearly, until another sum is paid on a distant fixed day, is not to me so clear. Still it is not the practice to treat interest, although expressly reserved by the terms of the contract, and payable at fixed days before the principal becomes due, as forming an independent item and debt certain on each of those days, for which an action of debt could be maintained. If it were so, then the plaintiff would be entitled to claim interest upon each such sum by way of damages for its detention, which would in effect be the recovery of compound interest, which it is not the practice of courts of law to allow.

There must be judgment for the defendants on the demurrer to the first twenty eight counts of the declaration.

See 2 Saund. 303, notes 6 and G.; Cook v. Whorwood, 3 Saund. 337; Rudder v. Price, 1 H. Bl. 547; Coates v. Hewit, 1 Wills, 80.

MICHAELMAS TERM, 22 VICTORIA.

Present :

THE HON. WILLIAM HENRY DRAPER, C. B., C. J.
 “ WILLIAM BUELL RICHARDS, J.
 (HAGARTY, J., being absent in Europe.)

RULES UNDER THE CRIMINAL APPEAL ACT.

Rules of court under the statute passed in the twentieth year of Her Majesty's reign, A.D., 1857, entitled “An Act to extend the right of appeal in criminal cases in Upper Canada.”

(These rules were promulgated in Hilary Term, 21 Vic.)

IT IS ORDERED,

1stly.—That in all cases of appeal from the judgment of the Court of Quarter Sessions, under the said statute, notice of such appeal shall be given by the person convicted, or his attorney, to the county attorney for the county in which the conviction shall have taken place within six days from the time of sentence being passed; or, in case there shall be no county attorney for such county, then to the clerk of the peace thereof; and an affidavit of service of such notice shall be filed in the superior court appealed to, with the papers directed by the said statute to be transmitted from the Court of Quarter Sessions.

2ndly.—That a copy of the indictment and of any subsequent pleadings, and of the verdict indorsed upon the indictment, shall be sent with the proceedings directed by the said statute to be transmitted; and that where the new trial has been moved for upon the ground that the evidence did not warrant the conviction, a full statement of the evidence shall be sent with the case, signed and certified in the same manner.

3rdly.—That every case sent from the Quarter Sessions shall state whether judgment on the conviction was passed, or postponed, or the execution of the judgment respited; and whether the person convicted is in prison, or has been discharged on recognizance of bail to appear and receive judgment.

4thly.—That in every such case of appeal from a Court of Quarter Sessions, the original case, signed by the recorder or chairman of the court, and four copies of such case, one for each judge, and one for the county attorney or other

counsel for the crown, shall be delivered to the clerk of the court appealed to, at least four days before the sitting of the said court : provided, that where the new trial has been moved upon the evidence only, one copy of the report of the evidence in full need be filed, in addition to the statement of the evidence which has been certified ; and that when any case is intended to be argued by counsel or by the parties, notice thereof be given to the clerk of the court appealed to, at least two days before the day appointed for argument, which shall be one of the paper days during the term.

5thly.—That upon any application for a new trial to either of the superior courts of common law, by or on behalf of any person convicted before a Court of Oyer and Terminer and Gaol Delivery, a copy of the indictment and subsequent pleadings, if any, and of the verdict indorsed upon the indictment, and a copy of any written instrument or writing on which the indictment is founded, the whole to be certified by the clerk of assize or other officer having the custody of the same, shall be filed in the court with the motion paper for a new trial.

6thly. That in every such case as is mentioned in the last preceding rule, where the person convicted has been defended by counsel at the trial, a detailed statement of the evidence, approved by the judge who tried the case, shall be furnished to the court of appeal by the defendant, at the same time with the copy of the indictment.

7thly.—That upon any application for a new trial to either of the superior courts of common law, by or on behalf of any person convicted before any Court of Oyer and Terminer, or Gaol delivery, if such court shall grant a rule to shew cause against the application, such rule may be made upon the Attorney-General, and it must contain a distinct statement of the grounds upon which the new trial has been moved, or such of them as shall have been entertained by the court, and the rule may be made returnable according to the general practice of the court, unless it shall be otherwise ordered, and shall be served upon the Attorney-General at least two days before the same is returnable.

8thly.—That if in any criminal case, in which a question or questions shall have been reserved for the opinion of either of the superior courts of common law, under the statute passed in the fifteenth year of Her Majesty's reign, intituled "An Act for the further amendment of the administration of the criminal law," the person or persons convicted shall move for a new trial, then, in case the court shall grant a rule to shew cause, all further proceedings

upon the case reserved, and stated by the judge who presided at the trial, shall thenceforth cease.

9thly.—That in all cases of appeal to the court of Error and Appeal, under the said act passed in the twentieth year of Her Majesty's reign, it shall be written on the back of the copy of the indictment filed in the court where judgment is appealed from, that the conviction of the defendant has been affirmed, which minute shall be signed by the Chief Justice, or in his absence by the senior puisne judge of such court; and the allowance of an appeal, when granted under the fourth clause of the said act, shall be written immediately thereunder, or elsewhere upon the back of the said copy of indictment; and the said copy of indictment and other pleadings, with such minute indorsed thereon, shall be delivered into the Court of Appeal in open court by the Chief Justice, or in his absence by the senior puisne judge of the court whose judgment has been appealed from, together with such copy or report of the evidence given upon the trial as was in possession of such court.

10thly.—And that whenever an appeal to the Court of Error and Appeal shall be allowed in any criminal case under the statute, a minute of such allowance shall be forthwith sent by the Chief Justice of the court, or by one of the judges thereof, who shall have signed such allowance, to the judge who presided at the trial, or, in case of his death or absence, to the Governor-General of the province, in order that the execution of the sentence may be respited, when that shall be proper to be done in consequence of such appeal.

(Signed),

JOHN BEVERLEY ROBINSON, C. J.
WILLIAM HENRY DRAPER, C. J. C. P.
ARCHIBALD McLEAN, J.
ROBERT EASTEN BURNS, J.
WILLIAM BUELL RICHARDS, J.
JOHN HAWKINS HAGARTY, J.

Toronto, 13th February, 1858.

ARNER V. MCKENNEY.

Ejectment—Conveyance—Description.

When two deeds were given to different parties of a lot containing 150 acres, the first covering 50 acres by metes and bounds, the last containing the whole lot, and commencing at the same point as the first, "except fifty acres already sold," it was *Held*, that the last deed did not prevail against the first, but covered the remaining 100 acres of the lot.

This was an action of ejectment in which the writ issued on the 13th of September, 1858, to recover possession of part of lot No. 54, in the township of Malden, in the county of Essex, described as follows: commencing at the north-east angle of the said lot, with the exception of fifty acres already sold or deeded, (the whole of the said lot having contained 150 acres,) where the lots No. 53, 54, 64, and 67, are nearly in contact, then south 31 chains, 30 links, then west to the edge of a certain marsh, granted to Captain Caldwell's sons; then north-westerly along the limits of the said marsh to lot No. 53, and then east to the place of beginning, containing 100 acres, more or less.

By a further description, directed by the judge's order, the plaintiff explained that he claimed the whole lot, with the exception of 50 acres on the easterly side thereof extending the whole depth, and bounded on the west by a line parallel to the easterly side line of the said lot.

The defence was limited to that portion of the lot comprised in the following description, commencing at the north-east angle of the third part of lot No. 54, opposite the lots No. 53, 54, 64, and 67, and nearly in contact; then south 10 chains, 65 links; then west to the edge of a certain marsh granted to Captain Caldwell's sons; then north-westerly along the limits of the marsh, to lot No. 53, and then east to the place of beginning.

For the plaintiff, it was proved that the patent for the whole lot issued to Samuel Cuthbertson on the 17th of May, 1802; that by several mesne conveyances the title became vested in one Richard Lawrence, and that the title was then (28th of March, 1825,) a registered title. That on the 28th of March, 1825, Richard Lawrence conveyed by bargain and sale for a valuable consideration to William Fisher, part

of the lot by the description given in this suit; that the deed was registered on the 13th of April, 1825; that by bargain and sale, dated the 17th of April, 1825, registered on the 26th of April, 1825, William Fisher conveyed the said land, more clearly describing it, to Jacob Arner. That Jacob Arner died intestate, leaving John Arner, his heir at law, and that by deed dated 13th January, 1850, registered the 19th of April, 1850, John Arner conveyed to the plaintiff.

For the defendant, it was proved that Richard Lawrence, by deed of bargain and sale, dated the 15th of May, 1824, for a valuable consideration, conveyed to John Stockwell, part of the lot by the description given in the notice of limitation of defence, that this deed was registered on the 9th of February, 1830, and that John Stockwell on the

, 1857, by deed conveyed the land defended for to his daughter, Lucy McKenney, the wife of the defendant.

The plaintiff's evidence also shewed that upon his purchase in 1824, Stockwell took possession of the easterly fifty acres by the whole depth of the lot, and built his house on the southerly portion thereof, and has occupied the same ever since, and always claimed that portion as having been bought by him from Lawrence. That he also said that there was a mistake in the deed from Lawrence, and was fearful of losing part of the land in consequence, and that on the 7th of July, 1834, he obtained from the heir-at-law of Lawrence, a conveyance of the easterly fifty acres by the whole depth for a nominal consideration to rectify the error.

The plaintiff contended that the deed from Lawrence to Fisher, under which he claimed, having been registered before the deed from Lawrence to Stockwell, under which defendant claimed, was entitled to priority, and that the description covers the land defended for, the exception therein not being an exception from the grant, but merely matter of description to fix the point of commencement.

The defendant claimed that the description in the deed of Lawrence to Fisher is void for uncertainty, also that the words "with the exception, etc.," exclude the land defended for from the description.

A verdict was entered for the plaintiff subject to the opinion of the court on the whole case.

The case was argued by *A. Prince* for plaintiff, and *O'Connor* for the defendant.

DRAPER, C. J., delivered the judgment of the court.

It is but very recently these same parties were before the court in an ejectment for the very piece of land now in dispute. The now plaintiff was in possession, and claimed to hold by virtue of the deed of the 28th of March, 1825, from Lawrence to Fisher, which he relied upon, because the title was a registered one, and this deed was registered before that of the 15th of May, 1824, from Lawrence to Stockwell, under which the now defendant claimed. We decided in favour of the now defendant, because it was not shewn that the deed under which Arner claimed was made upon valuable consideration, and the case of *Doe Cronk v. Smith* (7 U. C. Q. B. 376) was referred to as settling the question.

Arner now sues as plaintiff, relying on the same deed, and its priority in point of registration, and adding the fact, that Fisher was a purchaser for value, within the meaning of the registry act.

Looking at the deed of the 15th of May, 1824, its description, I think, certainly commences at the north-east angle of the lot, for though the words are, "commencing at the north-east angle of the third part of the lot," yet the residue shews that by those words the north-east angle of the whole lot is meant, for no other point will satisfy the residue of the description, which goes on thus, "opposite the lots No. 53, 54, 64 and 67, and nearly in contact; then south 10 chains, 65 links; then west to the edge of a certain marsh granted to Captain Caldwell's sons; then north-westerly along the limits of said marsh to lot No. 53, and then east to the place of beginning." Taking then the north-east angle of the lot as the point of beginning, there is no doubt that the fifty acres of land conveyed by that deed embrace the piece of land in dispute.

Then, looking at the deed of the 28th of March, 1825, the more obvious inference is, that whoever framed the description supposed that the 50 acres already conveyed extended along the whole easterly side, and along only a

part of the northerly side of the lot, and that with that view, the point of commencement was thus designated, "commencing at the north-east angle of the said lot, with the exception of fifty acres already sold or deeded, the whole of the said lot having contained 150 acres, where the lots 53, 54, 64 and 67, are nearly in contact," and hence, that the framer of the description meant the most easterly point on the northerly side of the lot, which would be found after taking as great a depth to the west, from the north-east angle of the lot as was necessary to leave fifty acres on the east end of the lot. The description will then cover exactly what would be the remaining 100 acres, though these hundred acres would be cut off from the concession road, and hemmed in by a swamp to the west, and on the north and south by lots Nos. 53 and 55. But any other place of beginning will be repugnant to the subsequent party of the description, if we treat it as confined to one hundred acres only.

But it is argued for the defendant, that, admitting this to be the proper construction of the description in the deed of the 28th of March, 1825, the description must, in that case, be treated as "*falsa demonstratio*," and must be rejected as repugnant to the "exception of fifty acres already sold or deeded."

Before enquiring as to whether this is an exception in the proper technical meaning of the term, or whether, as was urged by the plaintiff's counsel, the expression was used only to aid in ascertaining the point from which the description should run; we must be satisfied, whether there is no mode of so reading the deed of the 28th of March, 1825, so as to give it effect, both as an exception of the 50 acres already granted, and as a correct description of the whole lot from which the 50 acres are to be excepted. If nothing had been said about the exception of the 50 acres, the description in each deed would have the same identical starting point. The deed of the 28th of March 1825, contains an exact and accurate description of the 150 acres, commencing at the north-east angle of the lot; "then south 31 chains, 30 links; then west to the edge of a certain swamp

granted to Captain Caldwell's sons; then north-westerly, along the limit of the said marsh to lot No. 53, and then east to the place of beginning." The intention of the deed is plainly to convey 100 acres as being all that remained of the lot unsold by Lawrence. It was not intended to except the 50 acres out of the hundred acres remaining unsold; this is evident enough from the description, and from the reference to the whole contents, 150 acres. It would be no good *exception* in point of law, unless the thing excepted were included in the general grant of the lot (See Dyer 264, Plow. 153, Co. Lit. 57 a.)

If then we read the words, "with the exception of 50 acres already sold or deeded, the *whole* of the said lot *having contained*" (and necessarily still containing) "150 acres, more or less," as included within a parenthesis, as qualifying the general sense of description, but not as affecting or changing the particular point of commencement, *i. e.*, the north-east angle of the lot where the lots Nos. 53, 54, 64 and 67 are nearly in contact, we have a description of the 150 acres, and an exception thereof of the 50 acres already sold. And this is strengthened by the consideration that the same words are used in the deed of the 15th of May, 1824, to designate the same point of commencement.

I think this is the proper mode of construing the deed under which the plaintiff claims; that no part of the 50 acres "already deeded" passed by the deed of the 28th of March, 1825, though included within the lines of the description, and therefore that the defendant is entitled to the *postea*.

Postea to defendant.

EVANS V. BELL.

Promissory note—Waiver of the right to sue thereon—Collateral security.

“E.” holding ‘B’s.’ promissory note for £173 13s. 4d., agreed to take collateral security by mortgage on road stock, and give one year’s time on the note. “B.” mortgaged the stock and assigned it to “E.,” but for two years instead of one. “E.” refused to carry out this arrangement, and commenced an action upon the note, at the same time holding the security, and refusing to transfer it. The judge at the trial having ruled that the assignment as pleaded, was no bar to the action, a new trial was ordered without costs, the court holding that it was a point for the decision of the jury, whether “E.,” by retaining the security, did not consent to the two years asked in the assignment thereof, and if the pleadings did not raise the point, they could be amended at any time so as to do so.

DECLARATION, that defendant, by his promissory note, dated the 20th of May, 1857, promised to pay plaintiff £173 13s. 4d., four months after date.

Common money counts. Pleas, 1st.—*Non fecit.* 2nd. That after the making of the note, and before suit, defendant, by deed, assigned and transferred to plaintiff thirty shares held by defendant in the Williamsburgh Road Company, for securing the plaintiff the moneys in the first count mentioned, which assignment the plaintiff accepted and received from defendant in security of the moneys, &c. 3rd.—Never indebted to the common counts.

The trial took place in May last, at L’Original, before *Burns, J.* The assignment pleaded was produced, dated the 7th of September, 1857, made by defendant to plaintiff. It recited that defendant was indebted to plaintiff by the promissory note declared on; and for securing the same, and in consideration of 5s. assigned, transferred, and set over to plaintiff, thirty shares of stock in the Williamsburgh Road Company; habendum to plaintiff, subject to a proviso, that if defendant should pay to plaintiff the said sum of, &c., with interest from the 11th of September, 1857, at or before the expiration of two years from the date, the assignment should be void. This deed was produced by plaintiff on notice, and on its being called for on the defence; it was proved that defendant held seventy shares in his own name of this stock, and there were also ten shares in his son’s name. Defendant had agreed to make over eighty shares to two creditors in Montreal, forty shares to one Campbell, and forty to the

plaintiff; but finding he could only transfer seventy, he gave Campbell forty, as the debt to him was the largest, and thirty to the plaintiff.

On the 28th of September, 1857, the plaintiff wrote a letter to Mr. Rose, as follows: "Mr. Walter Bell transferred thirty shares in your turnpike road to me, but as yet has not handed me copies of the transfer, and is wishing to impose some new conditions that I cannot agree to. I beg to notify you not to re-transfer back the stock to him until you hear from me again, as I consider the stock as mine for the time being." Mr. Rose gave the secretary of the company notice of this letter.

On the 18th of March last, a witness went to the plaintiff in Montreal, taking with him a transfer deed of these shares, to get plaintiff to re-transfer them to defendant. The plaintiff refused, saying he held them as security for a debt which defendant owed him. In reply, plaintiff put in several letters from defendant, acknowledging his indebtedness to plaintiff, and urging for time on the ground that the plaintiff was well secured, and that defendant was unable at present to pay. These letters were written between the 10th of September and the 8th of December, 1857. He also proved that plaintiff had received a mortgage from the defendant, offering to give eighty shares in road stock in security to pay plaintiff and Mr. Campbell in one year, and then sent down the assignment of forty shares to Campbell and thirty to plaintiff, taking two years to pay the debt. That defendant sent an agent to Montreal to get plaintiff to accept and to sign a writing that he accepted the security, but that plaintiff refused.

The plea was amended by striking out a statement that plaintiff had accepted the transfer in satisfaction and discharge, and inserting that plaintiff, by his acceptance of the mortgage payable in two years, agreed to postpone the payment of the note for two years. In this shape the learned judge directed the jury that there was no evidence to support it. The charge was objected to, and it was contended the question should be submitted to the jury on the evidence

to infer such an agreement on the part of the plaintiff to accept the mortgage and give time.

The jury found for the plaintiff.

In Easter Term last *S. Richards* obtained a rule *nisi* for a new trial, contending that the direction was wrong, and that there was evidence to support the plea. He moved also, on the ground that the plaintiff had accepted the assignment of the stock, and by so doing, bound himself to the condition on which it was assigned.

In Michaelmas Term, *J. S. Macdonald*, Q. C., shewed cause. He admitted that the plaintiff had agreed to give one year on getting an assignment of forty shares, but that defendant endeavoured to substitute a different agreement, transferring thirty shares only, and claiming an extension of credit for two years.

S. Richards, contra, said it was true the defendant had not fulfilled the original agreement, but he had proposed a variation, and sent a transfer in accordance with the new proposal. The plaintiff might have rejected it, but instead of that he holds the assignment and will not give it up when applied to, and writes to the secretary of the road company not to transfer the shares back to the defendant, thus assuming control over them. He cited *Kennard v. Harris*, 2 B. & C. 801, and *Pearce v. Chaplin*, 9 Q. B. 802.

DRAPER, C. J., delivered the judgment of the court.

I think there should be a new trial. The plaintiff has no right to hold the assignment, and to keep the thirty shares of road stock standing in his own name on the company's books, (preventing their re-transfer to the defendant, who might make them available to satisfy some others of his creditors,) and at the same time to prosecute his action on this note. He might at once have repudiated the new proposal of defendant, for, notwithstanding the assignment, it was nothing more, and then he would have had a right to sue this note immediately. But he cannot keep it and the shares, and also sue the note. I think it should have been left to the jury to say, whether, looking at the plaintiff's whole conduct, he had not accepted the assignment on the

terms it expressed, namely, as a security for the note, and redeemable at the expiration of two years, and by paying the amount of the note and interest; in other words, that the shares were mortgaged to pay the debt, and that the plaintiff agreed to wait two years. Admitting that the plea is not well framed, still, if this is the real truth of the transaction, it might be amended to suit the facts at any time to allow substantial justice. As it is, the defendant has been deprived of his stock and its advantages for a year and upwards, for no other consideration unless forbearance for this debt, and the plaintiff is refusing the forbearance, in consideration of which the assignment is made, and still insists on holding the assignment and the shares.

In my opinion, there should be a new trial without costs.

Per cur.—Rule absolute without costs.

HINE ET AL. V. BEDDOME ET AL.

Partnership—*Liability of an incoming partner to pay the debts of his co-partners.*

Held, that an incoming partner, who as between himself and co-partners entered into a joint liability (with notice to the creditor), as well for prior as subsequent debts, was liable for debts contracted before he became a member of the firm, contrary to the general principle of law.

DECLARATION contained the common counts for money and goods.

Pleas, by defendants Wright and Rouse. 1st. Never indebted. 2nd. Payment. 3rd. Set-off. Issue—defendant Beddome, *nil dicit*.

The trial took place at Belleville, in October, 1858, before *McLean*, J., the only witness called was Benjamin Beddome. He swore that he and Mrs. Wright at first constituted the firm, they were the only partners; and that during that time they were indebted to the plaintiffs in the sum of £709 11s. 8d., currency. Beddome had on his own credit obtained goods before the partnership to the amount of £197 4s. sterling, which he brought into the firm as part of the capital stock. The defendant Rouse came to Canada in August, 1846, and after that he became a partner, and subsequently to that the firm got goods from the plaintiffs to the amount of £383 16s. sterling, £426 9s. 6½d. currency. There had been paid or remitted to the plaintiffs in 1855, £126 15s. 4d.

sterling, and in 1857, £150 sterling, £307 16s. 11d. currency. Of the £383 16s. 7d. sterling, obtained after the three defendants were partners, Beddome stated that goods to the amount of £62 10s. sterling had been sent out by the plaintiffs without orders: that the defendants as a firm had not accepted them; and that he, since the dissolution of that firm, had himself taken them. As to Rouse's liability, Beddome swore, that when Rouse came in as a partner he assumed an equal interest in the goods then on hand, and a liability for their value, and the accounts with the plaintiffs were carried on as before. He was fully aware of the amount due the plaintiffs at the time, and took the benefit of the goods received from the plaintiffs, and shared in all profits and losses of the firm. The partnership between the defendants was dissolved on the 1st of March, 1858. Beddome and Mrs. Wright left the firm, and Rouse has since carried on the business. At that dissolution, Rouse undertook to pay certain creditors of the firm, (not judgment creditors,) and he has since parted with goods to a considerable amount to these creditors to pay them. The plaintiffs were aware of Rouse coming into the firm, though the style of the firm was not changed. Goods to the full amount of all the payments were first obtained by Beddome on his individual account, but afterwards, by express arrangement, the amount was charged to the firm, and appeared on the books as a part of the indebtedness of the firm to the plaintiffs when Rouse came into the partnership.

The learned judge directed the jury, that as the first debt to the plaintiffs was contracted in the name of the firm of B. Beddome & Co., the plaintiffs had a right to apply remittances made by that firm to the earliest items of their account, there being no specific direction to apply them otherwise. That this would leave all the goods obtained since Rouse became a partner unpaid for, and that of the goods obtained by the firm there remained a balance due at the time Rouse entered the firm of £401 14s. 9d. He recommended the jury to find for plaintiffs for the whole amount, the account being recognised by Rouse as one for which he was liable, and having been continued without objection on his

part, with the firm of B. Beddome & Co., after he became a partner; and the learned judge reserved leave to the defendant Rouse to move to reduce the verdict, if the jury should find for the whole balance, which they did.

In Michaelmas Term, *Walbridge*, Q. C., obtained a rule nisi, to reduce the verdict by the amount of £401 14s. 9d. on the leave reserved, insisting there was no priority of contract between the plaintiffs and all three defendants as to this sum, and that the judgment entered be reduced by the same amount.

Dougall shewed cause, citing *Tumblay v. Meyers*, 16 U. C. Q. B. 143. He insisted that there was evidence given to shew that the plaintiffs were parties to the arrangement by which Rouse came into the firm, and gave future credit on the faith of his becoming responsible for the existing debt.

Wallbrige, Q. C., in reply, cited 12 Q. B. 92 931, to shew that a special count would be necessary to enable the plaintiffs to recover on such an agreement as was now set up. He also cited *Beale v. Moulds*, 10 Q. B. 976; *Batlay v. Lewis*, 1 M. & G. 155; *Vere v. Ashby*, 10 B. & C. 288.

DRAPER, C. J., delivered the judgment of the court.

The general principle, that when one person purchases goods, and another is afterwards permitted to share in the adventure, the vendors cannot recover against such other person for the price of the goods, is affirmed in *Young v. Hunter* (4 Taunt. 582), *Whitehead v. Barron* (2 Moo. & Rob. 248), *Beale v. Moulds* (10 Q. B. 976), and the cases there cited. In the last named case, *Helsby v. Mears* (5 B. & C. 504) is distinguished on a clear ground, and does not conflict with the general rule. *Shirreff et al. v. Wilks* (1 East 48), is a strong authority on the same subject.

That an incoming partner may become liable for debts due by the firm, incurred before he became a partner, is also well settled. The presumption of law arising from the general principle above stated, is against the liability of the incoming partner—*Catt v. Howard* (3 Stark 5)—and there must be sufficient and satisfactory proof of a new agreement to rebut that presumption.

Mr. Collier in his treatise on partnership (Book iii, ch. 3, sec. 2). The primary consideration for the jury is, between what parties was the contract actually made, and that if on the accession of a partner to the house a new promise was made by the entire new firm in respect of the old debt, in such case there is a deliberate *novatia debiti*, and the new partner must be charged on the contract.

In Strong on partnership, sec. 152, the rule is stated in similar terms with this addition, "*with the consent of the creditor.*" As regards the partners themselves and the accounts between them, the agreement may be binding, the consideration for it being the entering into partnership; but it is different as respects the rights of third parties.—See *Vere v. Ashby* (10 B. & C. 288). The creditor of the old firm is not bound by their arrangements, though he may assent to them, and by releasing his claim on the old firm acquire a right to sue the new one for debts due before the change. Lord *Eldon* (*ex parte Peele*, 6 Ves, 602,) observes, that, "he who seeks the benefit of that engagement must be able to say that though in its nature not a partnership transaction, yet there was some authority, beyond the mere circumstance of partnership, to enter into that contract so as to bind the partnership, and then it depends upon the degree of evidence. Slight circumstances might be sufficient where, in the original transaction, the party to be bound was not a partner, but at the subsequent time had acquired all the benefit, as if he had been a partner in the original transaction, and it would not be unwholesome for a jury to infer largely that that obligation, clearly according to conscience, had been given upon implied authority."

In the present case, the agreement as between the original parties of the firm of B. Beddome & Co., and the defendant Rouse, was clearly enough made out in the evidence, as well as that he was apprised of the state of the accounts and the liabilities of the firm to the plaintiff, and that these liabilities appeared on the books of the firm. Then it appears that the plaintiffs were made aware that Rouse had come into the firm, and that the accounts with the plaintiffs were carried on as before. I gather from this statement and the learned

judge's charge, that the plaintiffs rendered accounts after the time that Rouse became a partner, charging as well the old balance, as the goods furnished after he came into the firm; and a reference to the bill of particulars attached to the record shews, that goods were sold to the new firm exceeding £150 sterling within the first six months of 1857, and that the first remittance (of £50 sterling) made after Rouse became a partner, was made *before* the plaintiffs had furnished any goods to the new firm.

Upon the whole, I think there is sufficient evidence that the balance due by the old firm was, with plaintiffs' assent, and with that of the new firm, carried to the *debit* of the new firm: that it was one of the conditions of the new firm as between all the parties thereto, and that the arrangement was adopted by the plaintiffs.

Under these circumstances, I think the rule should be discharged.

Per cur.—Rule discharged.

DEEDES V. WALLACE.

APPEAL.

Replevin—Crown receipt—Statutes 4 & 5 Vic., ch. 110, and 12 Vic., ch. 31.

Held, that a receipt for the purchase money of a lot of land from the Crown under 4 & 5 Vic., ch. 100, entitled the purchaser to maintain trespass against any wrong-doer upon the property, or replevy any property taken therefrom.

The declaration stated that the defendant, before the commencement of this suit, took, and unjustly detained from the plaintiff, his goods, chattels, and personal property, to wit, a quantity of staves.

The defendant pleaded that he did not take the goods and chattels of the plaintiff as alleged. And for a second plea, that the said goods and chattels, at the said time when, &c., were the property of the defendant, and of one Matthew Scott, and not of the plaintiff, as alleged. Whereupon he prays judgment if the plaintiff ought to maintain his afore-said action thereof against him, and he also prays a return of the said goods and chattels. Joinder.

At the trial, before the judge of the County Court of the County of Norfolk, the plaintiff, in his opening, claimed 12,800 staves (which were proven to have been cut, or the greater portion thereof) upon lots 9, 10, 11, 12, 13 & 14, in the 4th concession of Houghton, for which lots articles of sale were also proved from the Crown (except one plaintiff obtained from the Canada Company) to parties, by assignment from whom plaintiff became entitled.

At the close of plaintiff's case, *Nichol*, for defendant, moved for a nonsuit on the following grounds :

1st.—That it was not shewn that plaintiff had any staves on any of these lands, merely standing timber, from which staves had been made by trespassers, and that therefore replevin cannot lie.

2nd.—If replevin would lie for staves made out of standing timber, that it is not shewn that defendant made any of these staves, or that he was in any way connected with the making.

3rd. That if replevin would lie, a demand and refusal must be proved before bringing a suit to make defendant liable, being an innocent purchaser without notice.

4th.—The plaintiff had no property in the standing timber, or the goods, &c., arising from them, inasmuch as the lands were not paid for, and no patent issued, the title being in the government, and that plaintiff is not in a position to bring or maintain an action for the timber or the product of it.

These objections were overruled, and leave reserved for defendant to move in term if the verdict should be adverse.

The evidence for the defence consisted in proving that staves had been cut by defendant upon other lots, and hauled to and sold at the same place as the staves in question.

The jury found for the plaintiffs, and 1s. damages.

In July term, *Nichol* moved for a nonsuit before the judge of the county court, on the ground taken at the trial, which rule was afterwards discharged, and the defendant has appealed from that decision.

In Michaelmas Term the case was argued before this court on the appeal by *C. S. Patterson*, for appellant, citing 4 & 5 Vic., ch. 100 ; *Pyne v. Dor*, 1 T. R. 55.

D. B. Read, contra, referred to *Coldstone v. Hiscolbs*, 1 Moodie & Robinson, 301; *Brancker v. Molyneux*, 3 M. & G. 84.

DRAPER, C. J., delivered the judgment of the court.

This is an appeal from the County Court of the County of Norfolk.

The defendant applied for a nonsuit at the trial, which was refused, and the motion was renewed (on leave reserved) in the following term, and a rule *nisi* was granted which, after argument, was discharged. Against this decision the defendant appeals, contending that the goods and chattels replevied were not the property of the plaintiff; that no property passed by any act proved either from the Crown, or the Canada Company to the plaintiff, to the timber out of which the staves in question were made.

The staves were made upon lots, all of which (one accepted, which belonged to the Canada Company) were purchased from the Crown under 4 & 5 Vic., ch. 100, and 12 Vic., ch. 31. It is not denied that the plaintiff was clothed, as to these lots, with the rights of a purchaser. The 18th section of the first-mentioned act enacts that the receipt for the purchase-money shall authorise the purchaser to take immediate possession of the lot sold, and to maintain actions and suits in law and equity against any wrongful possessor or trespasser on such land as fully and effectually as if the patent deed had issued on the day of the date of such receipt.

Some parties trespassed on these lots, cut down trees, and made the timber into staves. The plaintiff sent an agent, who seized those staves while on the lots, and marked them. Shortly after they were removed off the lots, and the plaintiff sued out a writ of replevin, and the sheriff seized them for plaintiff under that writ.

Conceding that the plaintiff could not have claimed to own the staves cut on the Canada Company's lot, which it is unnecessary to decide, there is no doubt as to the others, and therefore the plaintiff could not have been properly nonsuited.

Appeal dismissed with costs.

RAYMOND ET AL. V. COOPER ET AL.

Indemnity—Damages—Measure of.

Held, that the *value* of goods sold under execution upon a judgment recovered upon a covenant in a mortgage, against which the plaintiffs held a bond of indemnity from the defendants, did not form the measure of damages. *Held* also, that the right of action accrued upon the bond immediately upon the defendants making default on the mortgage, and that it was not necessary to shew a payment to recover.

WRIT specially indorsed, John L. Dampier makes default.

Declaration states that defendants became bound to plaintiffs in £4000, conditioned that defendant should fully protect, exonerate, and keep harmless plaintiffs from the covenants of a certain mortgage, from the plaintiff to one Caleb Coombe, on the west half of the north half of No. 11, first concession of the township of London, and from the payment of all money secured thereby, and from all costs and expenses incidental thereto. Averment, that the defendants did not fully protect, &c. Plea, by defendant Cooper, that the defendants did fully protect, &c. Issue.

The case was tried at the London assizes, in November last, before *Burns*, J. An exemplification of a judgment recovered by *Caleb Coombe* against the plaintiffs in an action of covenant was put in; entered the 14th of January, 1858, for £368 14s. 10d. damages, and £19 12s. 6d. costs, total £388 5s. 11d. Execution issued on this judgment, and the plaintiffs' goods were levied upon and sold. The cost price of these goods was stated to be £576. Their value at the selling price in plaintiffs' business was stated to be £690 11s. The price for which they actually sold was £254 18s. 2d.

The whole question was, as to the true amount of damages which the plaintiffs were entitled to recover. The plaintiffs' counsel contended that as they were entitled to claim indemnity, they should have the full selling price of their goods which they lost, and therefore were entitled to £690 11s., while the defendants' counsel insisted they were liable only for the sum the goods produced with interest, being £267 8s. 2d. The learned judge was of opinion the plaintiffs might recover the amount of the judgment entered against them with interest, being £408 0s. 11d., and for that sum

the verdict was rendered, leave being reserved to the plaintiffs to increase the verdict by £282 10s. 1d., and to the defendant to reduce it by £140 12s. 9d.

Cross rules were obtained in Michaelmas term, by *J. Wilson*, Q. C., for plaintiffs, and by *Anderson* for defendants, each rule being founded on the leave reserved.

Wilson cited *Loosemore v. Radford*, 9 M. & W. 657; *Lethbridge v. Mytton*, 2 B. & Ad. 772.

DRAPER, C. J., delivered the judgment of the court.

No other question is before us than those arising on the leave reserved. The plaintiffs' rule fails, unless they are entitled to recover the value, at retail prices, of the goods sold by the sheriff. The defendants' rule must be discharged, unless the right to recover is limited by the sum which the plaintiffs' goods actually produced. The effect of the plaintiffs' argument is, that they are to be indemnified against their own inability to meet payment of the sum which they covenanted to *pay* Caleb Coombe, in the mortgage which they gave to him, and not merely against the sum which under that covenant they would be liable to pay.

In *Carr v. Roberts* there was an indenture reciting that defendants had agreed to pay off certain mortgages and debts, and covenanted to save, protect, defend, keep harmless and indemnify the covenantee from the payment of the debts, and from all actions, &c., in respect of them. Breach, non-payment of an annuity for which the covenantee was liable, whereby the annuity bond became forfeited, and the grantee recovered against the plaintiff, the administratrix of the covenantee, and had judgment for £20 assets in hand, for judgment of assets *quando* for the residue. The court held, that there appeared on the indenture declared on, a covenant not only to indemnify but to pay the debt, and that the plaintiff might recover the whole arrears for which she was liable as administratrix, though she had only paid part.

In *Warwick v. Richardson* (10 M. & W. 284) the bond was conditioned to keep the obligee harmless and indemnified against all actions, suits, proceedings, claims, demands, loss,

costs, charges, damages, and expenses, on account of a sum of £10,000, (trust money held by the obligor and obligee,) or by reason of the obligor being permitted to hold the same. A bill in Chancery was filed after the death of the two trustees, the obligor and obligee, against their representatives, and it was decreed that they were jointly and severally liable to pay that sum, and the legatees carried in a claim against the obligees estate for that amount, but no money was received therefrom; the court held that the representatives of the obligee, the plaintiffs, were entitled to recover the £10,000, and the costs and interest, which would indemnify the obligee against the payments for which he had been rendered liable in consequence of the obligor not having saved him harmless.

The case of *Smith v. Howell* (6 Exch. 730) is a further authority to shew that plaintiffs may recover such moneys as they are actually liable for, under the covenant indemnified against, though they have not yet paid them. The condition of the bond contained an express undertaking to indemnify, or in its own words, "to protect, exonerate, and keep harmless" the plaintiffs from their covenants to Coombe, and from the payment of all moneys, and from all costs and expenses incidental thereto. The plaintiffs' covenants were to pay money on a fixed day, and the defendants should have paid the money according to the covenant, or they failed in exonerating the plaintiffs from it.

We discharge the plaintiffs' rule, because we are of opinion that the value of the plaintiffs' goods taken and sold in execution, on a judgment for breach of the covenant indemnified against, does not form the true measure of damages.

We discharge the defendants' rule, because we think the plaintiffs' right of action was complete on the failure of the defendant to save plaintiffs from liability for breach of covenant, and that it was not necessary for the plaintiffs to prove they had paid the amount due on the covenant; they were to be exonerated from that payment.

We do not express any opinion, for the point was not taken at the trial, whether the plaintiffs were entitled to recover the costs of the suit brought against them by Coombe.

Per cur.—Both rules discharged.

BOCHUS V. SHAW ET AL.

Joint contractors—Evidence—Amendment by striking out names.

Held, that the certificate of registration of vessels under 8 Vic., ch. 5, is the legal evidence by which ownership can be proved, and upon an action on a joint contract against more than one defendant, the evidence failing in proof as to one, a nonsuit was ordered, the recent decisions under the English Common Law Procedure Act not permitting the striking out of a defendant's name in such case.

DECLARATION on common counts for work and labour of plaintiff as agent of defendants, and otherwise, money paid, money lent, interest, and account stated. Defendant Hinds pleaded never indebted.

John Shaw, of Kingston, by *Burrows* pleaded a similar plea, on which pleas issues were joined. Judgment by default signed against the other defendants.

The bill of particulars attached to the record commences with the item under date of

31st of November, 1856, to amount of account rendered	£1307	16	0
Under the same date, and up to the 18th December, there are items amounting, including a charge of interest, to.....		79	0 9

Making the debtor's side of plaintiff's acct.	1385	16	9
The plaintiff then credits items up to the 18th November, 1856, amounting to.....	£1081	18	4
He then credits September 14, 1857, draft on Shaw, Turnbull.	125	0	0
And February, 1858, cash	100	0	0
	£1306	18	4

Balance claimed by plaintiff	79	18	5
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At the trial, before *Richards*, J., at the last fall assizes for the united counties of Stormont, Dundas and Glengarry, plaintiff proved an admission of the correctness of the account by John Shaw, of Toronto, and in order to connect the other defendants with him as owners of the boat, a document signed by Mr. Boutillier, the collector of customs at Montreal, was put in. The following is a copy :

“ *Custom House, Montreal, 23rd October, 1858.*

“ The undermentioned parties are at this date the registered owners of the number of shares set opposite their names

in the steamer *Monarch*, registered at this office under No. 13, of 1856, on the 5th September, 1856 :

Archibald Sinclair, sixteen shares	16
D. & J. McCarthy & Co., five “	5
Ralph Fish, two “	2
John Shaw, twenty-four “	24
William Geo. Hinds, seventeen “	17
Shares.....	64

“(Signed),

“J. BOUTILLIERE, Collector.”

Plaintiff called a witness, who proved that James Shaw and John Shaw of Kingston, had stock in the steamer *Monarch*. He did not know that Mr. Hinds had any stock in her. He got up the stock for the boat. She was built in the fall of 1855, and in 1856. On this, plaintiff moved to strike out the name of Mr. Hinds, which was granted, on the plaintiff's attorney undertaking to pay his costs.

For defendant, *J. S. Macdonald*, Q. C., objected, that the evidence to shew John Shaw of Kingston was an owner was insufficient. The vessel being a registered one, the only legal proof of ownership was the certificate granted under the Ship Registry Act of 8 Vic., ch. 5. The document produced was not the certificate of ownership, nor was it sufficient evidence of ownership. That there was no evidence to shew that John Shaw of Toronto was a joint owner with John Shaw of Kingston, and therefore his admissions would not bind John Shaw of Kingston.

Leave was given to defendant Shaw to move to enter a nonsuit on any of these grounds.

In Michaelmas Term, *Borrows* moved, pursuant to leave reserved, to set aside the verdict against John Shaw of Kingston, and to enter a nonsuit for him.

During the term, *J. S. Macdonald*, Q. C., shewed cause, and admitted that under 8 Vic., cap. 5, sec. 22, the production of a certified copy does not prove the original, but contended that this was a copy of an official document purporting to be certified under the hand of the proper officer or person in whose custody it was, and was therefore evidence under 13 & 14 Vic., ch. 19, sec. 4, or under 16 Vic., ch. 19, sec. 9.

He referred to *Braithwaite et al. v. Skofield et al.*, 9 B. & C. 401, and *Ellis v. Schmœck*, 5 Bing. 421, as shewing that when persons contribute to the funds of a society, or hold scrip in a company, they are liable to strangers for debts contracted.

Philpotts, contra, contended that the collector should certify there was a certificate of ownership, and that it was in his office, in order to bring it within any of the statutes referring to proof of documents by the certificate of parties in whose custody they were. That none of the statutes applied to a case like the present, where the Ship Registry Act itself provided for the mode of proof in which the documents filed in the collector's office could be proven. That the certificate produced only shews one John Shaw as a registered owner, and that must be John Shaw of Toronto, and therefore there is no evidence to shew a partnership between the two Shaws, so that an admission by one would bind his client.

RICHARDS, J., delivered the judgment of the court.

There is this difficulty in the way of the plaintiff's recovery, if the document signed by the collector of Montreal is to be taken as furnishing evidence of ownership on the 5th of September, 1856, and thenceforward until the 23rd of October, 1858; then there is only one John Shaw named in it, and the weight of evidence is, that John Shaw of Toronto is that person, for he acknowledged the account and promised to pay the balance; and it consequently furnishes no evidence as to Shaw of Kingston. Then the witness who proved that Mr. Shaw of Kingston was a stockholder, states that he was so when the stock for the boat was originally taken up, and the boat was built in the fall of 1855, and the spring probably of 1856. Shaw of Kingston may well have ceased to be a stockholder before she was registered in September, 1856. Then, if the certificate of ownership is discarded, what evidence is there that both the Shaws were joint owners or stock holders in the vessel at the same time. The witness called on behalf of the plaintiff does not prove it. The only John Shaw he

refers to is John Shaw of Kingston; then the admission of the balance of the account by John Shaw of Toronto proves that at the currency of the account he admitted a liability, and promised to pay. The account annexed to the record appears to commence with a large sum as amount of account rendered to the 31st of November, 1856; then the credits shew receipt of freights for certain trips of the vessel. It may be that the interest of John Shaw of Toronto arose after the vessel commenced to run, and may be quite distinct from that of John Shaw of Kingston. But the plaintiff, in any view of the case, fails to shew a joint contract between John Shaw of Kingston and all the rest of the defendants. The certificate of ownership does not mention either Garratt Watson or Perry, and there is no evidence whatever to shew that they were joint contractors with the two Shaws in relation to the plaintiff's account. *Robeson et al. v. Ganderton* (9 C. & P. 476), and *Elliott v. Morgan et al.*, are express authorities on this point, although several of the defendants may have allowed judgment to pass against them by default. The recent cases permitting amendments by striking out the name of the defendant under the 70th section of the Common Law Procedure Act, 1856, sec. 37, of the English Act of 1852, shew that the courts still adhere to the principle, that in an action of assumpsit against joint contractors, it is necessary to prove a joint contract by all the defendants. *Cowburn v. Wearing*, 9 Ex. 207; *Robson v. Doyle*, 3 E. & B. 396; *Greaves v. Humphreys*, 1 Jur. N. S. 473, may be referred to.

The rule must be absolute to enter a nonsuit.

TULLOCH V. WELLS ET AL.

Amendment—Striking out parties—Common Law Procedure Act.

The names of parties to suits will not be struck out unless it appears that they were inserted by mistake, and not with the object of fixing the party so joined with an unjust debt or liability.

DECLARATION on common counts, and for work done, and materials provided by the plaintiff for the defendants at their request. Money lent by the plaintiff to the defendants.

Money paid by the plaintiff for the defendants at their request. Money received by the defendants for the use of the plaintiff. Money found to be due from the defendants to the plaintiff on accounts stated between them. And the plaintiff claims five hundred pounds.

A count alleging, for that the plaintiffs agreed with the defendants to cut and manufacture of the pine trees of the defendants, then growing upon certain closes of the defendants, in the Township of Innisfil, eight thousand pieces of pine timber, to be equal in quantity to eight thousand standard saw logs, and to deliver the said timber when so cut and manufactured on the banks of Kempenfeldt Bay, on Lake Simcoe, at and for a certain price per thousand. And the defendants agreed to supply the plaintiff with such portion or part of the said price so agreed upon as would enable the plaintiff to carry on and fulfil the said agreement on his part. That he (plaintiff) afterwards cut and delivered at the said bank on Kempenfeldt bay as aforesaid two thousand two hundred pieces of timber.

Averment of readiness to perform the remainder of the contract, but that defendant did not pay as agreed upon sufficient to enable him to carry it out.

And that by reason whereof there is now due to plaintiff £500.

Pleas—never indebted, payment and set-off. And as to the last count, they did not agree as alleged. That they did supply the plaintiff with a portion of the price as agreed. Payment. And that plaintiff did not manufacture as he should have done. Joinder.

At the Barrie assizes, before *Hagarty, J.*, the case was referred to *Hector Cameron, Esquire*, to find and state a special case for the court; to fix the amount of damages, with power to examine witnesses, &c.; with power to certify as to costs, and amend pleading. Upon which submission the arbitrator awarded and determined, among other things, "that the defendants were not co-partners." This being the point upon which this judgment of the court turns.

In Michaelmas Term, *Eccles, Q. C.*, for plaintiff, applied for judgment on the award.

D'Arcy Boulton applied to have Lount's name struck out. The following case was cited: *Wickens v. Steel*, 2 Com. B. N. S. 488.

DRAPER, C. J., delivered the judgment of the court.

The finding by the arbitrator that the two defendants were not co-partners disposes of the whole case. For as all the other findings go only to establish a liability (be it greater or smaller) against the defendant Wells, it follows that unless he and the defendant Lount were in partnership, so that contracts and dealings entered into by one affected both, the action fails; and on this ground the defendants are entitled to the judgment of the court (see *Bochus v. Shaw*, prior case.) Mr. Boulton has, however, applied to us to amend the whole proceeding from the very commencement, by striking out the name of the defendant Lount. The case of *Wilkins v. George Street and Alexander Street* appears to me a clear authority against this application. *Cockburn*, C. J., says, the section allowing the names of defendants in an action to be struck out "is designed to meet the case of a defendant who has been erroneously joined, and such erroneous misjoinder is put upon the footing of a variance." But I think it clearly was not intended to apply to a case where a party has been joined as a defendant, not by mistake, but intentionally, and with the deliberate purpose of trying to fix him with liability. I entirely agree with this, and with the estimate of mischievous consequences likely to follow, if such an amendment were to be allowed. Parties would be made defendants in the hope that a jury might, on slight evidence, be induced to fix a liability upon them, if a plaintiff were assured that failing against a defendant thus improperly joined, he could, by an amendment, drop his name from the record, and recover against those who were really liable.

I think, therefore, the application to amend should be refused.

APPELBY V. WITHALL ET AL.

Trover—Conversion—Interpleader.

Held, that where the claimant, under an interpleader order, (after first directing a sale and then countermanding it,) accepted part of the proceeds of the sale of the goods, he thereby adopted the sale, and cannot hold the execution creditor liable for a conversion.

TROVER.—Pleas—not guilty, and leave and license. Tried at Belleville, in October, 1858, before *McLean*, J.

It appeared that the defendants had recovered a judgment against Fred. R. Warwick, and Andrew B. Stewart, and had issued an execution thereon, directed to the sheriff of Hastings, who seized the goods and chattels, for which this action was brought, in the possession of the plaintiff, who claimed them. In consequence of this claim the sheriff applied for and obtained from the *Chief Justice* of Upper Canada an interpleader order, directing that, upon payment into court by the now plaintiff of £120, or upon his giving, within three weeks, security to the satisfaction of the sheriff for the payment of that sum according to any rule of court or judge's order, to be made in that behalf, the sheriff should withdraw from the possession of the said goods. That in the mean time, and until such payment be made or security given, the sheriff should continue in possession of the goods, and that the claimant should pay possession money for the time the sheriff should so continue, unless the claimant should desire the goods to be sold, in which case the sheriff was to sell and pay the proceeds, after deducting the expenses and the possession money from that date (29th of May, 1857), into court, and the cause to abide further order therein. The interpleader order then directed an issue in the usual manner. It was tried, and a verdict rendered for the plaintiff.

The plaintiff did not either pay the money into court, (£120,) or give security within the three weeks. But on the 11th of June, 1857, he addressed to the sheriff's bailiff in possession the following notice: "Withall et al. v. Warwick et al. As required by the interpleader order in this cause, I hereby desire you to proceed to a sale of the goods and chattels, or a sufficient portion thereof, to satisfy the

said execution, the proceeds of the said sale to be paid into court as directed by the said order." This was signed by himself, and served on the bailiff to whom it was directed, on the day it bears date. In consequence of that notice the goods were sold on the 6th of July, 1857. About a fortnight before this sale, and after the expiration of three weeks limited by the interpleader order, a bond for the security of the payment required was prepared and shewn to the deputy sheriff, and by his direction was left at the office of Mr. Bell, attorney for the now defendants, for their inspection. It was returned before the sale, with an intimation that it was too late, no objection being stated to the form of the bond, or to the surety proposed. It was not shewn that it was executed either by the plaintiff or the proposed surety. The goods sold for £79 7s. 5d. They had been valued, according to the invoice prices of them, at £236 4s. 1d.; but the witness who made the estimate said that though some of them were worth more than the invoice prices, taking the whole together, he would not give these prices, and that he thought they were well sold. Some of them would not have depreciated by being kept. £50 of the proceeds of the sale was paid over to the plaintiff after the decision of the interpleader suit. The sheriff's fees and the expense of taking stock amounted to £12 7s. 6d. The balance still remains in the sheriff's hands. It does not appear that any rule of court or judge's order has been made in the interpleader, since the first order of the 29th of May, 1857.

A nonsuit was moved for on the ground that no conversion by the defendants was shewn; that they might be responsible in trespass, but that would be for the entry and seizure, not for the subsequent sale. It was agreed that defendants might move for a nonsuit, and the jury found for the plaintiff, damages £100.

Bell of Belleville obtained and supported a rule *nisi* on the leave reserved, citing *Buckland v. Johnson*, 15 Com. B. 145.

Walbridge, Q. C., shewed cause.

DRAPER, C. J., delivered the judgment of the court.

We have to determine the plaintiff's right of action for

an alleged conversion of his goods by the defendants. Whether they were trespassers, or no, in causing the sheriff to seize them, is not the question. Probably they directed the seizure of the plaintiff's goods, conceiving that they belonged to the execution debtors Warwick and Stewart, but if so, the mere act of seizure would not, followed by a conversion, entitle the plaintiff to recover the value of the goods.

By the terms of the interpleader order, there were two alternatives given to the plaintiff to have the possession of these goods restored to him, on his complying with either, the sheriff was directed to withdraw from possession, or the plaintiff might direct the sale of the goods, the money to be brought into court subject to the determination of the interpleader suit. Before the time expired, within which he must comply with one or other conditions for the restoration of the goods, he gave the sheriff a notice to sell them. And after the expiration of that time, he countermanded the notice and offered security, which was one of the alternatives. Clearly he had no strict right under the interpleader order to insist on the security being then accepted, and to have the goods returned to him. If he had a right to countermand the sale, the result would have been that the sheriff would have remained in possession. But the sale which did take place was, so far as appears, the sheriff's act, not the defendants, for though the bond was submitted to Mr. Bell, who was the defendants' attorney, it is not proved that he took upon himself to give any direction on behalf of the defendants. He may have expressed himself content or not content with the security, with which, however, as defendants' attorney, he had nothing to do, for it was to be to the satisfaction of the sheriff. But he is not shewn to have directed the sale, which was a matter resting on the terms of the interpleader order. So far, therefore, I see no proof of a conversion. And if the sheriff, though erroneously, persisted in selling, because he considered the plaintiff had no right to countermand the direction to sell, the defendants could not thereby be made guilty of a conversion, and if the sale was properly to be considered as a sale directed by the plaintiff, there was no conversion at all.

But it appears that since the sale the plaintiff has received £50—part of the proceeds; and this, I think, affords strong, if not conclusive, evidence that he adopted the sale as made under his direction; that he affirmed the original order to sell, and disaffirmed the countermand.

On the ground that there was no evidence of a conversion by the defendants, I think the rule for nonsuit should be made absolute, and this makes it unnecessary to consider the grounds urged for a new trial.

Per cur.—Rule absolute to enter a nonsuit.

MACDOUGALL V. WORDSWORTH.

Promissory note—Endorser—Notice.

Where the notary (who had protested the promissory note sued upon) under a plea of no notice, stated first that notice had been given, but upon referring to his book of notarial entries, and finding no notarial charges, stated that he felt “rather staggered” as to his having sent the notice.

Held, that the jury were warranted in finding for the defendant.

The declaration stated that one Charles Robinson, by his promissory note, dated, &c., promised to pay to the defendant or order £309 six months after date; that defendant endorsed the note to plaintiff, with averments of presentment, dishonour and notice.

Pleas.—1st. No notice. 2nd. Payment by the maker at maturity. 3rd. On equitable grounds: that C. R. and defendant were partners: that it was agreed they should dissolve partnership, and that C. R. should pay defendant £1000, as follows, £400 down, £300 with interest, by an endorsed promissory note, to bear date the 27th of September, 1856, payable in six months, and £300 with interest, by an endorsed promissory note of like date, payable in twelve months: that C. R. made the note in the declaration mentioned, in pursuance of such agreement, for the first £300, and procured the plaintiff to endorse the note for the accommodation of C. R., and as security to the defendant for the due payment of the amount thereof, and upon the understanding that plaintiff was to be liable to defendant for the payment: that C. R., after plaintiff’s endorsement, delivered the note to defendant in pursuance of the said agreement: that after receiving said note defendant handed

it to one R. Y., to be placed in the bank of B. N. A., to be collected on account of defendant and for his use, and that while the note was in the bank it was paid either by C. R. or by plaintiff: that after such payment, plaintiff, for the first time, received the note after the delivery thereof by C. R. to defendant: that there never was any consideration for defendant's endorsing the note to plaintiff, who received the same with the full knowledge of the premises. Issue on the 1st and 2nd pleas, and *de injuria* replied to the 3rd, on which issue was joined.

The case was tried at Toronto, in October last, before *Hagarty, J.* The notary who protested the note was called as a witness to prove notice. At first he stated that he had no doubt that he had sent notice to the defendant—a regular notice of dishonour in the name of the bank as holder—but afterwards on referring to his book of notarial entries, he stated that he found no charge entered for noting this note, and from the absence of this entry he felt “rather staggered” as to the fact of his having sent a notice. As to payment, the note was produced at the trial with the name of the maker and of the plaintiff, which had been endorsed on it, struck through with a pen, and in his evidence taken upon a commission, Robinson swore that this note had been paid by the proceeds of two other notes made by him in favour of the plaintiff McDougall and endorsed by him, which were discounted for that purpose, though he could not state whether he or McDougall took this note up. The two notes spoken of were produced at the trial, bearing date on the 30th of March, 1857, the day on which the note sued upon in this action fell due. The endorser's name (McDougall's) was struck through with a pen, that of Robinson, the maker, remained untouched.

As to the third plea, Robinson's evidence fully sustained it, but he also stated that McDougall was no party to the agreement between him and Wordsworth. That when he endorsed this note Robinson supposed it was for the purpose of securing the debt due by him to Wordsworth, but that at the time McDougall enquired of Robinson whether

Wordsworth was good, and said that Wordsworth would be liable on the note before himself.

The case was left to the jury on the evidence, and they found for the defendant on the ground of want of notice.

In Michaelmas Term, *Eccles*, Q. C., obtained a rule *nisi* for a new trial, contending that there was sufficient evidence of notice, and the jury ought to have found it. He also filed an affidavit of the plaintiff, stating that the promissory note declared on was taken up and paid by him on the 31st of March, 1857, being the day after that on which the same became due. That on that day he received a notice from L. W. Smith, Esq., a notary public, informing him that the note had been presented and protested for non-payment, which notice has been lost or destroyed. That he does not remember if there was any protest attached to the note when he took it up, but he believes there was, and that it has been mislaid, lost or destroyed.

M. C. Cameron shewed cause. He contended that upon the evidence the note must be assumed to have been taken up on the last day of grace, and though noted, was not actually protested. And that there was no evidence of notice, referring to *Hawkes v. Salter*, 4 Bing. 715. That the plaintiff's swearing he received notice did not prove that the defendant had received any, and that nothing contained in the plaintiff's affidavit was capable of being answered by the defendant, for none of the matters therein stated were within defendant's knowledge. That the defendant was entitled to succeed on the other issues, and therefore a new trial should not be granted upon this. *Lawson v. Sherwood*, 1 Starkie, 314.

DRAPER, C. J., delivered the judgment of the court.

I cannot say that I think the jury have done wrong in finding that the defendant had not received notice of dishonour, for the utmost that can be said of the evidence of the notary public is that, though at first he expressed his belief—founded apparently on no recollection of the particular transaction—but on his usual course of practice,

that he had sent notice, yet that he was, to use his own phrase, "staggered" when, on reference to his book, he found he had made no charge. It is impossible to say that the verdict is against evidence; on the contrary, I think there would have been some difficulty in saying that the evidence would clearly support a contrary conclusion.

It certainly would have been more satisfactory if the defendant, having now the opportunity, had denied the receipt of any notice. Still that fact is not asserted against him in the plaintiff's affidavit, in which case it would have been incumbent on him to meet it, and the plaintiff might have called him at the trial. It is not laid as a ground for a new trial, that the plaintiff was taken by surprise at the notary not proving the notice, or that he has any other evidence to offer at a second trial. The ground taken in the rule is that presentment and notice of dishonour were sufficiently proved.

Considering the other evidence given at the trial, I must confess I do not see any ground for interference upon the apparent merits of the case, and thinking that as the question went fairly to the jury, they were not arbitrarily rejecting the effect of evidence, or denying its proper weight in finding that notice was not proved. I think we should discharge this rule.

Per cur.—Rule discharged

WORDSWORTH V. MACDOUGALL.

Promissory note—Second endorser liable to first thereon—Under what circumstances.

"W.," the first endorser of a promissory note, sued "M.," the second endorser, and upon the trial proved that the note had been given by the maker, one "C. R.," upon the dissolution of a partnership between himself and the plaintiff as security to the plaintiff for the amount of the note due to him upon such settlement, and with the understanding that an endorser should be given. "M." endorsed the note after the plaintiff, with notice of these facts.

Held, that he was liable to the prior endorser for the amount.

The declaration set forth that one Charles Robinson, on, &c., by his promissory note, promised to pay one Richard Wordsworth or order, at the bank of B. N. A., in Toronto, £318, twelve months after date, and the said R. W. endorsed

the same to the defendant, who endorsed the same to the plaintiff. Averment of presentment, dishonour and notice.

Plea, that the said R. W., as the payee and endorser of the promissory note therein set forth, was and is the plaintiff in the cause.

Replication, that the promissory note was in fact made and endorsed after the date thereof, that it was ante-dated: that the said C. R. was indebted to the plaintiff among other sums in the sum of £300, with interest, from the 27th of September, 1856, and it was agreed between plaintiff and C. R. that C. R. should make the promissory note, and procure defendant to endorse it to secure plaintiff, and by way of guarantee to plaintiff, for payment thereof, and that plaintiff should receive such note in payment and discharge of the said sum of £300 and interest, of all which defendant, before endorsing the said note, had notice and agreed thereto. And therefore C. R. made the note and delivered it to plaintiff, and thereupon plaintiff, in furtherance of the agreement and not otherwise, and without any consideration or value, did endorse the note to the defendant as in the declaration mentioned, in order that defendant, in furtherance of the agreement, might endorse the note to the plaintiff for the purpose of securing and guaranteeing the payment to the plaintiff, and thereupon the defendant did, for the purpose aforesaid and not otherwise, endorse the said note, which is the endorsement in the declaration mentioned, and the plaintiff accepted the same in payment and discharge of the debt of £300 and interest, due to him by the said C. R. Issue.

The evidence given in this case was that of C. Robinson, taken on the commission referred to in the preceding case. The protest for non-payment and of notice were proved. It was objected for the defendant that the plea must be proved by some writing signed by defendant, in order to contradict the legal effect of the note itself and of the endorsements upon it.

The jury found for the plaintiff.

In Michaelmas Term, *Eccles*, Q. C., obtained a rule *nisi* for a new trial, on the ground that the replication was

contradicted by the note and endorsements, and by the declaration, and on the evidence and on the defendant's affidavit, or for a repleader or to arrest the judgment.

In the same term, *Bell* (of Toronto) shewed cause. He cited *Foster v. Farewell*, 13 U. C. Q. B. 449; *Smith v. Marsach*, 6 C. B. 486; *Williams v. Clarke*, 16 M. & W. 834, and *Morris v. Walker*, 15 Q. B. 589.

DRAPER, C. J., delivered the judgment of the court.

The defendant's affidavit is contradictory to the evidence given by Robinson. His account of the transaction is given thus: "The note" (that sued upon) "was made for the purpose of giving it to the plaintiff in this cause, as part of the consideration money to be paid by me to him, for his share of the partnership business between us. I gave the note to the plaintiff. The plaintiff agreed to take two notes, one at six months and one at twelve months, provided I would get him an endorser on the notes. I saw the defendant afterwards, and told him that the plaintiff had agreed to take my notes as above mentioned, provided I could get an endorser. I handed the defendant the notes, which he then endorsed; he at the same time enquired of me whether Wordsworth was good, and said he (Wordsworth) would be liable on the notes before the defendant." In another part of his testimony he explains why he gave the plaintiff anything, and speaks of his agreement "to give him one thousand pounds for his share, and to have the partnership dissolved between him and me." And he swore the partnership was dissolved, and that "the defendant did to my knowledge endorse the said note for the express purpose of enabling me to carry out my arrangement with the plaintiff, and as I supposed to secure the plaintiff the due payment of the money therein mentioned;" and lastly, "the defendant was not a party to the agreement made between the plaintiff and me. He did endorse the note in question, and also the other note above mentioned, and as I supposed for the purpose of securing the debt due by me to the plaintiff. He at the same time enquired of me whether Wordsworth was good, and said that he (Wordsworth) would be liable on the notes before him (the defendant)."

The jury, upon this evidence, have in effect found what is stated in the replication, that the defendant endorsed for the purpose of securing and guaranteeing the payment to the plaintiff, and such is the plain purport of Robinson's evidence.

As to the matter of law, I see no substantial distinction between this case and *Wilders v. Stevens*, 15 M. & W. 208, and *Morris v. Walker*, in which the authorities are reviewed, and the question is so well settled, that it requires no further remark. The plea shews that the plaintiff was the first endorser, which was left uncertain on the declaration, and assumes as the legal consequence that the defendant, the second endorser, can recover from him, wherefore this action will not lie. The replication confesses that the plaintiff was the first endorser, but avoids the consequence by shewing that this endorsement was without value, and was made under such circumstances that the plaintiff as such endorser was not liable to the defendant, and thus it displaces the defence set up. The cases referred to establish that such a replication is a legal answer to the plea, and the jury have found that the replication is proved. The fact that the notes bore date some time before the dissolution of partnership, the enquiry made by defendant as to Wordsworth's solvency, and defendant's observation that he would be the first party liable as endorser, were all before the jury; and weighing the whole evidence, they have found the substantial fact that the defendant's endorsement was made in order that he should be liable to the plaintiff, but that it was not intended that the plaintiff, by his endorsement, should be liable to the defendant.

I think, therefore, that the rule should be discharged on all points.

Per cur.—Rule discharged.

HARRIS ET AL. V. PERRY.

Promissory note—Presentment—Notice.

Held, that a promissory note made payable at a particular place, and “not otherwise or elsewhere,” did not require special presentment, it being proved to have been on the day it matured at the place where it was made payable: and the following notice to the endorser held sufficient: “Strathroy, 13th of October, 1857. John Ham Perry, Esq., Whitby, C. W. Sir, a certain promissory note for three hundred and fifty pounds, and interest, given on the 10th day of April last, in favour of John Ham Perry, and endorsed by you, and signed B. F. Perry, in favour of Hiram Dell, of Strathroy, fell due on the 10–13th instant; you will, in consequence of non-payment, be held responsible for all costs or damages for non-payment.”

DECLARATION stated, that one B. S. Perry, on the 10th of April, 1857, by his promissory note, promised to pay the defendant or order £350, six months after date, and defendant endorsed the same to plaintiffs. Averment of presentment, dishonor and notice.

Pleas—1. That the note was not duly presented. 2. No notice of dishonor. 3. Time given to the maker in consideration of £8 15s., for three months, without the defendant’s knowledge, authority or consent. 4. Plea of time given varying the statement. Issues.

At the trial in November, at London, before *Burns, J.*, the note was produced, and on the face of it was payable to the defendant or order, at the residence of Hiram Dell, Strathroy only, and not otherwise or elsewhere, and Hiram Dell being called as a witness, swore that he had the note at his residence at Strathroy the day it fell due, and that no one came to pay it, and that on the 13th of October, 1857, he sent notice to defendant at Whitby, where he resides, putting it in the post-office himself. On cross-examination he stated, that he passed the note to the plaintiffs in November, 1857, in account between themselves: that he had never heard of any agreement to give time. The notice sent to defendant by this witness was identified by him. It was as follows:

“*Strathroy, 13th October, 1857.*

“John Ham Perry, Esquire,

“*Whitby, C. W.*

“SIR,—A certain promissory note for three hundred and fifty pounds, and interest, given on the 10th day of April last, in favour of John Ham Perry, and endorsed by

you, and signed by B. F. Perry, in favour of Hiram Dell, of Strathroy, fell due on the 10–13th instant; you will, in consequence of the non-payment, be held responsible for all costs or damages for non-payment.”

For the defence it was objected this notice was insufficient, both as respects presentment and non-payment. The learned judge overruled the objection, reserving leave to move, and the plaintiffs had a verdict.

In Michaelmas Term *Ham* obtained a rule *nisi* for a non-suit on the leave reserved.

J. Wilson, Q. C., shewed cause, he cited the Bank of Montreal v. Grover, 3 U. C. Q. B., 27; and Bank of Upper Canada v. Street, *Id.* 29.

Ham contra, referred to Solarte v. Palmer, 1 Bing. N. Ca. 194; Boulton v. Welsh, 3 Bing. N. C. 688, which was founded on Solarte v. Palmer, and Hartly v. Case, 4 B. & C. 339; Lewis v. Gompertz, 6 M. & W. 399; Furze v. Sherwood, 2 Q. B. 388. He contended that this letter did not directly, nor yet by necessary implication contain a statement of presentment, of a refusal to pay, and that the defendant was looked to for payment. He referred also to Phillips v. Gould, 8 C. & P. 355.

DRAPER, C. J., delivered the Judgment of the court.

In the elaborate review of the then preceding cases, made by Lord Denman, C. J., in Furze v. Sherwood, he remarks upon Boulton v. Welsh, as “decided by the Court of Common Pleas reluctantly, from deference to what was decided in Solarte v. Palmer, and which can hardly now be deemed a satisfactory authority.” In the later case of Chard v. Fox (14 Q. B. 200), the court held that it was a sufficient notice of dishonour to the endorser of a note, if a person acting for the holder informs him that the note *has been presented* and dishonoured, though he does not add that the endorser will be looked to for payment; and Coleridge, J., observes, “The disposition of the courts has not been to extend the doctrine acted upon in Solarte v. Palmer,” and in Everard v. Watson (1 E. & B. 801; 17 Jur. 762), is the following letter from the holders to the endorser: “We beg to acquaint you with the

non-payment of W. M.'s acceptance to J. W.'s draft of 29th December last, at four months, for £50, amounting with expenses to £50. 5s. 1d., which remit us in course of post without fail or pay to Messrs. E.," was held a sufficient notice of dishonour. Lord *Campbell* gives his clear opinion, that this letter conveys notice that the bill has been presented, has been dishonoured, and that payment of it has been required. He also says, "The decision of the House of Lords in *Solarte v. Palmer*, is much to be regretted, it has caused great confusion and mischief in the mercantile world. We must be bound by it when a notice in the same language comes before us." And *Esle, J.*, in reference to *Solarte v. Palmer*, remarks, "Subject to the restriction imposed by that case, that a bare notice that the bill is unpaid, is not sufficient, any instrument which conveys to the party notice that the bill has been presented and dishonoured, and that he ought to pay it, I should be inclined to hold a sufficient notice of dishonour."

In *Cooke v. French* (10 A. & E. 131, note) "D.'s acceptance for £200, drawn and indorsed by you due the 31st of July, has been presented for payment and returned, and now remains unpaid," was held a sufficient notice.

So in *King v. Bickley* (2 Q. B. 419), "I hereby give notice, that a bill for £50, at three months after date, by A., upon and accepted by B., and endorsed by you, lies at, &c., dishonored," was held sufficient without any further intimation that plaintiff looked to defendant for payment.

And in *Robson v. Curlewis* (2 Q. B. 421), "Your draft upon C. for £50, due the 3rd of March, is returned to us unpaid, and if not taken up this day, proceedings will be taken against you for the recovery thereof," was held sufficient.

I refer also to *Harrison v. Ruscoe* (15 M. & W. 231), and *Caunt v. Thompson* (7 C. B. 400), and to *Jennings v. Roberts* (1 Jur. N. S. 401; 4 E. & B. 615), *Dixon v. Johnson* (1 Jur. N. S. 70), *Paul v. Jewell* (4 Jur. N. S. 1086).

The note in this case was payable at a particular place, and not otherwise or elsewhere. It was at that place, in *Dell's* possession, on the day on which it fell due. As holder

at the place, it was not necessary for him to go through an empty form of presentment any more than if under precisely similar circumstances it be necessary to do so, were the note lying at a bank. Being payable at a specified place only, it was the maker's duty to provide for it there. Then as to the form of notice, I think this contains as explicit a notice as that in *Everard v. Watson*, and therefore that we may uphold it as sufficient. I think we may treat the words, "endorsed by you, and signed by B. F. Perry, in favour of Hiram Dell," as equivalent to a statement that the writer, Hiram Dell, was the holder when the note fell due, and that the note was made and indorsed to him. He dates from Strathroy, as the note is payable at the residence of Hiram Dell, Strathroy only. Now, when he writes to the defendant, telling him that, "in consequence of non-payment," he will be held responsible, I think we may ask, in the language of Lord *Campbell*, "Is there any human being possessed of common understanding who will not learn from this the fact, that the bill has been presented, that it has been dishonoured, and that the party addressed is looked to for payment?" I rely on the facts that the note was payable at the residence of Hiram Dell, Strathroy, and not elsewhere—that the notice is written by Hiram Dell, from Strathroy. From these facts the necessary inference is, that he was then the holder, or that the holder had left it in his hands, that it might be "at his residence" on the day when it fell due; and the notice, I think, then conveys to the endorser, that the note lay there for payment—which is, under such circumstances, a presentment—that the notice contains a statement of dishonour: that the defendant is looked to for payment was not denied.

I think the rule should be discharged.

McLENNAN V. THE GRAND TRUNK RAILWAY COMPANY.

Held, that a railway company is not bound to maintain and keep up fences along their track, except as between them and the owners of the adjoining property; and when cattle were allowed to pasture upon a neighbour's land, and from thence strayed on the railway track, and were killed, *Held*, that the railway company were not responsible.

The first count of the declaration stated that defendants, for the purposes of their railway, took a portion of the plaintiff's land, and the lands of other persons in the township of Lancaster, immediately west of plaintiff's said land, and constructed their railway thereon, running nearly through the centre of plaintiff's land; that it became the duty of defendants to erect and maintain on each side of the railway fences of the height and strength of an ordinary division fence, with openings, or gates or bars thereon, and farm crossings for the use of the proprietors of land adjoining, and cattle-guards at all road crossings. That at the time, &c., plaintiff was the proprietor of the said land, on which he had a stock of cattle. That by the municipal regulations of the said township, cattle were allowed to run at large on such portions of plaintiff's lands, and of the lands immediately west thereof as lie on the north side of the railway. That six of plaintiff's cattle were lawfully depasturing on plaintiff's lands, and the said other lands, yet defendants not regarding, &c., did not on the completion of the railway, and before using the same, erect and maintain on each side of the railway, fences, &c., with gates, &c., and for want thereof six head of cattle of plaintiff's so lawfully depasturing, &c., through defect of the defendant's fences and gates, escaped from the said lands upon the railway, and were killed by defendants' locomotive, &c. Nothing turns on the second count. The defendants pleaded, 1st. Not guilty. 2nd. That plaintiff's cattle were not lawfully on the lands from which they escaped on to the railway.

The case was tried at Cornwall, in October, 1857, before the *Chief Justice* of Upper Canada.

A by-law of the municipality of Lancaster, passed 21st of February, 1852, was put in, providing (sec. 5) "that it shall not be lawful for any person or persons to allow the running

at large of any stone-horse, ram, or swine, all such stone-horses, rams, or swine found running at large contrary to the provisions of this section may be impounded, and the owner or owners of such animal or animals is subject to the payment of poundage fees," and also to the payment of penalties, which are to be paid over to the township treasurer. A further by-law, passed 21st April, 1852, was put in, providing that it should not be lawful for any person to allow the running at large of any horses of the age of two years and upwards, oxen of the age of two years and upwards, and sheep; persons offending, subject to a fine of 1s. for each animal. It appeared that the plaintiff's land adjoined to that of one Devine, the railway track passing east and west through both lots. That there were bars in the railway fence on each side where it passed through plaintiff's lot, opposite to each other, and that plaintiff's cows were driven through the bars, across the road way, from the south to the north part of plaintiff's land; the bars being put up as soon as the cattle had passed. There was no fence dividing plaintiff's land from Devine's; there was pasture land lying open on each of their lands. The cows passed from plaintiff's land on to Devine's, and thence they passed through similar bars, which were in the railway fence for Devine's convenience to pass from one part of his land to the other. The bars on the north side, at Devine's land, were down, though it was proved that about two hours or so before the accident they were properly up. It did not appear who opened or left them down. The jury expressly found that the cows passed through these bars, and were killed soon after getting on the railway. The negligence and breach of duty charged upon the defendants, was the allowing these bars to be open. The defendant's liability on the second count was admitted, and a verdict was accordingly given for the plaintiff on that count with £8 5s. damages. It was further agreed that the plaintiff's damages on the first count amounted to £41 10s. On the jury finding that the cows got upon the railway through the gate or bars on the north side of Devine's crossing, the bars being then down, the learned Chief Justice directed a verdict for the defendants to be entered on this count, with

leave to the plaintiff to move to enter a verdict for him, if the court should be of opinion that on the evidence and finding of the jury he was entitled to recover.

In Michaelmas Term, 1857, *J. S. Macdonald*, Q. C., moved accordingly to increase the verdict by the sum of £41 10s.

In the same term, 1858, *Bell*, (of Belleville,) shewed cause. He cited *Jack v. O. S. & H. Railway Company*, 14 U. C. Q. B. 328; *Auger v. O. S. & H. Railway Company*, 16 U. C. Q. B. 92; *Rickets v. East & West India Docks, &c., Railway Company*, 12 C. B. 160.

J. S. Macdonald, Q. C., contra, argued that by the effect of the by-laws put in, all cattle not coming within their express provisions had, by implication, a right to run at large, and therefore the plaintiff's cattle were lawfully on Devine's land, against which it was the defendants' duty to make and maintain fences; and that the fact that the bars on Devine's land, being left open, afforded proof that the defendants had been guilty of negligence in *maintaining* the fence. He cited *Dorey v. O. S. H. Railway Company*, 11 U. C. 600; *Ellis v. S. W. Railway Company*, 3 Jur. N. S. 1008; *Sharrod v. London and N. W. Railway Company*, 4 Exch. 580.

DRAPER, C. J., delivered the judgment of the court.

The general rule of law is well stated, in the oft cited passage from 1 Wm. Saunders 322, note *c*: "I am bound to take care that my beast do not trespass upon the land of my neighbour; and he is also bound to take care that his cattle do not wander from his land and tresspass on mine, and therefore this kind of action will only lie against a person who can be shewn to be bound by prescription or special obligation to repair the fence in question, for the benefit of the owner of the adjoining land. And no man can be bound to repair for the benefit of those who have no right. Therefore the plaintiff cannot recover for the damage occasioned to his cattle by their escape from the adjoining close, through the defect of the defendants' fences, unless the plaintiff had an interest in that close, or a license from the owner to put them there," citing *Dovaston v. Payne*, 2 H. Bl. 527.

The 13th section of 14 & 15 Vic., ch. 51, firstly enacts that

fences shall be erected and maintained on each side of the railway, of the height and strength of an ordinary division fence, with openings or gates or bars therein, and farm-crossings of the road *for the use of the proprietors of the lands adjoining the railway.*

I cannot adopt Mr. *Macdonald's* argument that the by-laws put in evidence, have, by prohibiting the animals enumerated from running at large, (and that subject to a penalty,) the effect of legalising the running at large of all other cattle not mentioned. The 19th sub-section of the 31st section of 12 Vic., ch. 81, gave the municipality power for restraining and regulating the running at large of horses, &c., and to provide for the impounding of the same, and for fixing the periods of the year during which such animals *shall be permitted to run at large*, and those during which they shall be restrained from doing so. The legislature treat the powers of permitting or restraining animals in running at large as distinct. And I do not feel warranted in saying, that by exercising the one, the effect of which exercise is to superadd a penalty to the common law obligation of preventing cattle from trespassing, they must be assumed to have exercised the other, which is to make a change in the common law.

I think the obligation on the part of the defendants is only to fence against the owners of the adjoining lands, and that the plaintiff's cattle cannot, without overruling the case of *Richetts v. The East & West India Docks, &c., R. W. Co.* and the subsequent cases in which that decision is approved and acted on, be held to be lawfully on the land from which they escaped upon the railway.

For all that is shewn, they were trespassing on Devine's land. It is true that neither the plaintiff's land nor that of Devine appears to have been ever enclosed on the north side of the railway fence; but that would not give the plaintiff any right to have his cattle pastured upon Devine's land. Even if Devine had given him permission, it would not necessarily have followed that he could have recovered, for I do not think that the mere fact that bars, which the statute requires should be made for the use of the proprietor of the

adjoining lands, are left open, is proof of negligence against the company. As long as they kept the bars in good and sufficient repair, it appears to me that was all they were required to do. The owner of the land for whose use they were constructed, would have the duty of closing them cast upon him, as he had the sole right of using them. But it is not necessary to determine this point, as, without it, I am of opinion the rule must be discharged.

See *Fawcett v. York and North Midland R. W. Co.*, 16 Q. B. 610.

SCATCHERD V. THE EQUITABLE FIRE INSURANCE COMPANY.

Registration of vessels—Mortgagor considered owner when registered—Insurance of mortgagee's interest.

Upon an action for insurance upon a vessel under the usual interim receipt, *Held*, that the mortgagor of a non-registered vessel had not such an interest as was saleable under a *fi. fa.*, the 23rd sec. of the statute 8 Vic., ch. 5, only declaring that the *registered* owner, although he shall have mortgaged the vessel, shall be considered to be the owner thereof; and that by a purchase under a *fi. fa.* of the mortgagor's interest in a *non-registered vessel*, the legal estate did not pass.

The plaintiff, at the trial, claiming as owner under a sale as above stated, and the judge ruling against him, applied and was allowed to prove his interest as mortgagee.

Upon a motion for a nonsuit upon that ground,

Held, that it was a matter in the discretion of the judge at *nisi prius* to permit such a variance in the line of proof, and the defendants not shewing themselves damnified by the exercise of this discretion, a nonsuit was refused.

The declaration states that, on the 1st of April, 1858, plaintiff applied to defendants to insure against fire in the sum of \$5000, the hull, standing rigging and machinery of the steamer "Forest City," of which the plaintiff was the owner, as then lying at Port Stanley, for one month, from the 1st of April, and plaintiff paid the premium, and defendants granted plaintiff a receipt therefor, and also insured in the sum of \$5000 the said property, until within thirty days from that date a policy should be issued, if approved by the local directors at Montreal, or until the insurance should be cancelled by defendants. That afterwards, and whilst the insurance created by the receipt was in force, before the policy issued, and before the local directors approved or cancelled the same, the steamer was acci-

dentally destroyed and damaged by fire, to the value of £1500, whilst still plaintiff's property; yet defendants have not paid. Second count for money had and received.

Pleas to 1st count: 1st. Did not issue the receipt. 2nd. The property not the plaintiff's. 3rd. That the receipt was subject to all the terms and conditions of the policy in use by defendants, among which is the following: "All persons insured by this company, sustaining any loss or damage by fire, are forthwith to give notice to the agent through whom insured, or to the nearest agent, and, within one calendar month after such loss or damage has occurred, are to deliver in as particular an account of their loss or damage as the nature of the case will admit of, and, if required, make proof of the same by their oath or affirmation, according to the form used in the said office, and by the production of the books of account and other proper vouchers, and give such further information thereon as shall be necessary, and shall, if required, procure a certificate under the hands of three or more respectable householders nearest to the place where the fire has happened, and not concerned in such loss, importing that they are acquainted with the character and circumstances of the person insured, and do know or verily believe that he, &c., really and by misfortune, without any kind of fraud or evil practice, has sustained by such fire loss and damage to the amount therein mentioned. Until such affidavit, account and certificate are produced, and such explanation given, the amount of the loss shall not be payable. Also, if there be found to be any false swearing or attempt at fraud, collusion, or wilful misstatement on the part or in the behalf of the person insured, or if it should appear that the fire shall have been occasioned by any wilful act or connivance on his part, he shall forfeit all claim to restitution or payment by virtue of his policy." That defendants required plaintiff to furnish them with a statement shewing his title and interest in the steamer, together with all deeds and instruments evidencing such title and interest, and to furnish them with copies of all accounts and transactions between plaintiff and one Paul Phipps, and to state what securities plaintiff then held, or,

at the effecting the insurance on the said steamer, did hold for securing payment of any debt due from Phipps to plaintiff, and how and for what consideration plaintiff acquired the interest of Phipps in the steamer, and whether the interest of the plaintiff in the steamer was that of owner or mortgagee, and required plaintiff to make proof of the said deeds, instruments, accounts, matters and things under his oath, none of which plaintiff has done, contrary to the condition, &c. 4th. Plea to second count never indebted. 5th. To the first count that the insurance was effected through the fraud, misrepresentation and concealment of the agent of the plaintiff, through whom the same was effected.

Replication takes issue on 1st, 2nd, 4th and 5th pleas. To the 3rd plea, that defendants did not at any time before the commencement of this suit require the plaintiff to do as in that plea is alleged, defendants demur.

The trial took place at London, in November, 1858, before *Burns, J.* The receipt for insurance, signed by the defendants' agent at London, and dated the 1st of April, 1858, was proved. It was as follows: "Received of Thomas Scatcherd, Esq., the sum of \$16.63, for the insurance of \$5000, agreeable to instructions received this day, for which a policy will be issued by the Equitable Assurance Company, within 30 days from this date, if approved by their local directors at Montreal, or otherwise this insurance to be cancelled and a *pro rata* premium returned for the unexpired term." (Signed, &c.)

"This receipt is subject to all the terms and conditions of the policy in use by the company at the date hereof."

To prove property in the plaintiff, was put in an exemplification of a judgment (under the seal of the Court of Common Pleas) recovered by *Thomas Mason v. Paul Phipps*, for £311 damages and £15 17s. 5d. costs, in an action on promises. Judgment entered the 10th of April, 1857. A *fi. fa.* issued to the sheriff of Elgin on this judgment, and on the 27th of June, 1857, he sold the vessel, executing a bill of sale by which, after the usual recitals, the sheriff, in consideration of £14, granted, bargained, sold, assigned

and set over "as much as in me lieth by virtue of the said writ and of my office," to the plaintiff, the said steamer, goods and chattels, furniture, tackle, anchors and appurtenances. *Habendum* all the estate, right, title, interest, claim and demand which the said Paul Phipps had in the same, to plaintiff, his executors, administrators and assigns. The sheriff proved that this sale was subject to mortgages, one to one Morton, the other to plaintiff: that the plaintiff claimed a mortgage of \$4000 on her, and on this account she sold only for £14. Paul Phipps was called as a witness, and swore he formerly owned the "Forest City:" that she was worth \$10,000, and was burned in April, 1858. On cross-examination he stated that he had effected an insurance on her for the plaintiff in the Times and Beacon office, for a term that expired in March, 1858: that he applied to the same office for a further insurance, to commence from such expiration, and it was refused, because, as he swore he believed, that company would not insure for a month: that he then applied for the present insurance to the defendants' agent, and did not tell him that the Times and Beacon would not insure for so short a time, but told him they would not insure for less—he thought—than six months. He said he was under an indictment for having caused the firing of the vessel. The destruction of the steamer, except what the boiler and old iron might be worth, was proved.

The defendants' counsel objected, that no title to the vessel in Phipps was shewn; that the provincial statute 8 Vic., ch. 5, is repealed by the imperial statute 17 and 18 Vic., ch. 104, under which every vessel must be registered, and that no registry having been shewn with respect to this vessel, no title to her is proved; and that the title relied on being the sheriff's deed, and the sale having been sworn to be subject to two mortgages, one claimed by the plaintiff to be held by himself, Phipps, if he had any title at all, had only an equity of redemption, which was not, on the 27th of June, 1857, subject to be sold on a *fi. fa.*, for the act 20 Vic., ch. 3—by the 11th sec. whereof the interest or equity of redemption, in chattels mortgaged, of the mortga-

gor, was made saleable in execution—did not come into force until the 1st of August, 1857.

The plaintiff's counsel then, by leave of the learned judge, (the defendants' counsel strenuously objecting,) put in a mortgage of this vessel dated the 9th of May, 1857, from Paul Phipps to the plaintiff for £942 10s., and there rested his case.

The defendants' counsel urged that the plaintiff should be required to elect, whether he claimed as owner, or as mortgagee, admitting that a mortgagee's interest was insurable. This was declined, and the learned judge allowed the case to proceed, to settle the issues, and reserved leave to the defendants to move to enter a nonsuit on any or either of the objections raised. On the defence it was then proved that when Phipps applied to defendants' agent to insure, he was asked if she had been previously insured, and stated that she had been, with the Times and Beacon, but that they would not re-insure for a less time than three months, and as the navigation would be open by the 1st of May, he did not wish to insure against fire for a longer time than one month. The agent swore that the insurance was a *special* risk, and therefore he would not have granted it, had he known that the Times and Beacon had been applied to to take it, and had refused. He would then have forwarded the application to Montreal. But he accepted it, and gave the receipt on the 1st of April, on Phipps promising to bring the premium on that day. It was not until the 5th of April that Phipps brought the plaintiff's check to the agent for the premium, who then took it. The next morning the vessel was burnt. It was also proved that on the 19th of March, the day after the previous insurance expired, Phipps applied to the agent of the Times and Beacon office at London, to insure the "Forest City" for one month, to the 19th of April, for £1250. That company declined the insurance, and the premium was returned to Phipps, who stated that the plaintiff was informed that the insurance was declined, by a letter from the company from Montreal.

The learned judge left it to the jury to say whether Phipps fraudulently withheld from the defendants' agent the infor-

mation that an application had been made to the Times and Beacon Company to insure for a month, and whether it was material for the defendants to have had that information. They answered that the information was not fraudulently withheld, and that it was not material, &c., and gave a verdict for plaintiff for £1294 15s.

The defendants had further leave to move to reduce the verdict to the amount of the mortgage money, if the court should be of opinion that the plaintiff could only recover on that title.

In Michaelmas Term, *Galt* obtained a rule *nisi* for a nonsuit on the leave reserved, or for a new trial on the law and evidence, and for surprise, because the plaintiff, after closing his case, was allowed to put in the mortgage as proof of his insurable interest, after opening his case as owner; or to reduce the verdict to the amount of the mortgage money and interest.

Eccles, Q. C., shewed cause. He argued that the 23rd section of the statute 8 Vic., ch. 5, applied to vessels, although not registered under that act. The enactment is that when any transfer of any ship or vessel, or of any share thereof, shall be made only as a security for the payment of a debt, either by way of mortgage or of assignment to a trustee, for the purpose of selling the same for the payment of any debt, the collector of the port where the ship or vessel is registered, shall, in the entry in the book of registry, and also in the endorsement on the certificate of ownership, in manner hereinbefore directed, state and express that such transfer was made only as a security for the payment of a debt, or by way of mortgage, or to that effect, and the person to whom such transfer shall be made, or any person claiming under him as a mortgagee or as a trustee only, shall not by reason thereof be deemed to be the owner of such ship or vessel or shares thereof, nor shall the person making such transfer be deemed by reason thereof to have ceased to be an owner any more than if no such transfer had been made, except so far as may be necessary for the purpose of rendering the ship, vessel or shares so transferred available, by sale, for the payment of the debt, to secure

which such transfer was made. And the argument was, that notwithstanding the mortgage, Phipps was, under this enactment, to be treated as owner of the vessel, and therefore his interest as owner was a legal interest, saleable under the *fi. fa.*, and so passed to the plaintiff. As to the alleged fraudulent concealment by Phipps, he argued that the reasons of the Times and Beacon Company for not renewing the insurance were, it must be presumed, contained in the letter to the plaintiff spoken of, and it was not shewn that the reason given was not that they would not insure for so short a period as one month, or for a less period than three or six months, a reason for no re-insurance by them which had been communicated to the defendants' agent, though he swore he did not understand the application had been made and refused on that ground, but rather put it as if he understood no application for re-insurance on that ground had been made. He argued that it really made no difference to defendants to know that no re-insurance had been applied for, because of this determination or practice of the Times and Beacon office, or that having been applied for it was refused upon that ground. There was nothing to shew that Phipps had misrepresented the reasons why there was no such re-insurance.

Galt, contra, urged that the 23rd sec. of the 8th Vic. was plainly limited to vessels registered under that act, a construction which he contended derived force from the 10th sec. of the 20 Vic., ch. 3, which provided that the latter act should not apply to mortgages of vessels registered under the 8th Vic., and therefore shewed that the clause permitting the sale of an equity of redemption of a mortgage chattel was not intended to apply to a mortgage of a vessel registered under the 8th Vic., but that it would apply where such vessel was not registered, in which case the mortgagor would be regarded as having only the equity of redemption and not the ownership, subject to the satisfaction of the mortgage by payment of the debt. He renewed, but did not strongly press the argument, that the imperial statute 17 and 18 Vic., ch. 104, virtually repealed the provincial statute 8 Vic. He referred to Abbott on Shipping, 1, 2, ch. 1, s. 4; Angell on Insurance, s. 174 to 177.

It is of great importance to the defendants that the title of the plaintiff should be accurately determined. If he be absolute owner, then he may have a right to the full amount insured; but if only mortgagee, the defendants have a right to enquire how much is due upon the mortgage.

He contended that if, at the trial, the defendants had asked to have the trial put off, when the plaintiff was allowed to amend his case after closing it, by putting in the mortgage, it must have been granted, and the plaintiff have paid the costs, as a condition of the indulgence which saved him from being nonsuited, and that for the same reason a new trial without costs should be granted now.

He urged, also, that Phipps had absolutely misrepresented the refusal of the Times and Beacon Company. For he never said, which turned out to be true, that the agent of the company had given him a receipt for a month's insurance, which the company itself rejected and annulled as soon as the fact became known at the head office at Montreal. He cited *Anderson v. Fitzgerald*, 17 Jur. 995; 1 Arnould, s. 190, *et seq.*; *Phillips on Insurance*, sec. 39, *et seq.*; *Quebec Fire Assurance Company v. St. Louis*, 7 M. P. Cu., 286; *Mason v. Harvy*, 22 Law Jl. N. S. Ex. 335.

DRAPER, C. J., delivered the judgment of the court.

I am of opinion that the 23rd sec. of 8 Vic., ch. 5, is limited to cases in which vessels registered under that act, or any shares therein, were mortgaged, and that it extends only to declare that the registered owner, notwithstanding that he has mortgaged the vessel to secure payment of a debt due by him, shall still be deemed the owner. Consequently as the steamer "Forest City" was not a registered vessel, the mortgage from Phipps passed his legal interest in her to the plaintiff, and left no interest in him on the 10th of June, 1857, which was on that day saleable under a *fi. fa.*; that nothing in fact passed by that sale. In my opinion, therefore, the defendants were entitled to have prevailed on their motion for a nonsuit at that particular stage of the trial.

It was a matter, however, in the discretion of the learned

judge, to give the plaintiffs an opportunity of curing this defect by shewing that he had, at the time this insurance was effected, an insurable interest under the mortgage from Phipps, who swears he was owner, and whose right to mortgage is not denied. The terms on which this indulgence should be granted were also with the learned judge, and it does not appear that the defendants objected to it on the ground that it became necessary for them to produce evidence which they were not then prepared with. It is not suggested even now that the admission of evidence shewing the plaintiff's interest as mortgagee, has rendered it necessary for their defence to give further evidence, nor that they had further evidence to offer; they went on with their defence, calling witnesses upon another branch of it, a branch equally applicable whatever the nature of the plaintiff's insurable interest was. Under these circumstances it does not appear to me that we ought to grant a new trial on account of the indulgence granted, or any consequence shewn to have resulted from it.

As to the finding of the jury upon the matter submitted to them, the contest of the defendants was that a material fact was concealed from them by Phipps, acting as agent for the plaintiff. This fact had no relation to the vessel herself, or any thing connected with her situation or the value of the risk. It was, that an application to insure her for a month had been made to, and accepted by, the agent of the Times and Beacon Company, which, on being reported to the directors in Montreal, had been cancelled, and a letter on the subject was written by their direction to the plaintiff. Phipps did not communicate the fact of this application, but on being asked by defendants' agent why he had not re-insured with the Times and Beacon, he replied to the effect, because they would not insure for so short a time as one month. There was nothing proved at the trial, nor is there any thing now suggested, to shew that the refusal arose from any other cause. And if the cause was truly represented by Phipps, I do not see that we can hold that the jury wrongly decided the question submitted to them, whether the non-representation was of a fact material to be

known, and whether the information was fraudulently withheld. They negatived actual fraud, and the probable influence on the mind of the insurer was the only question that could arise. It is true that the defendants' agent swore that if he had known he would not have taken the risk on his own responsibility. Possibly not, and yet we ought not to forget he stands by the result in a situation naturally affecting him with a desire to place himself favourably with his principals. But what would have been the probable effect on the principals, if they had known that there had been a previous insurance with the Times and Beacon Company not renewed, and the fact that the Times and Beacon would not insure only for a month? Would it have probably made any difference that they refused for that reason on being applied to, or that they were not applied to because that was their rule? It is not shewn when the defendants' agent communicated the fact of the application, and his accepting it subject to their approval; whether he wrote immediately after giving the receipt on the 1st of April, or not until after receiving the premium on the 5th. I think this ground also fails to justify our granting a new trial.

As I am of opinion the plaintiff's right to recover rests on his being mortgagee and not owner, it follows that he should recover only the amount due on the mortgage with interest.

I have considered the provisions of the imperial statute 17 and 18 Vic., ch. 104, but I do not find that they touch this question, which is not whether the "Forest City" had become entitled to the privileges and character of a British ship.

Upon the argument of the demurrer to the replication, it appeared from the statements of the defendants' counsel that the real point intended to be raised by way of defence was, that after the action was brought, the defendants had called upon the plaintiff for certain information which they were entitled to demand under the terms and conditions subject to which this insurance was made, and that the plaintiff had not given them such information; and that

they had demurred to the replication, stating that the defendants did not at any time, before the commencement of the suit, require the plaintiff to do as in the plea alleged. My brother *Richards* drew the attention of the defendants' counsel to the 117th sec. of the Common Law Procedure Act of 1856, which enacts that any plea which does not state whether the defence therein set up arose before or after action, shall be deemed to be a plea of matter arising before action. We did not give judgment immediately after hearing the parties on the demurrer, and when the rule *nisi* came on for argument on the following day, Mr. *Galt* applied for leave to withdraw the demurrer and amend, and that application is now before us also. No affidavit was filed for the defendants, explanatory of the facts, or swearing to merits in the matter of the third plea. By the record we perceive that the writ of summons in the cause was sued out on the 14th of May, 1858, and if for this purpose we are at liberty to look at the evidence given at the trial, we see that the fire took place on the 6th of April preceding. We have nothing before us to shew that the defendants were bound by the terms of the policy to pay within any fixed period, from which it might be inferred that they should within that period demand the information or make the enquiries, on the result of which it might depend whether they would dispute the claim or no, or whether it was a matter to be done within a reasonable time. The declaration was apparently filed on the 9th of October; the pleas on the 18th; the replication on the 23rd; the demurrer on the 26th, and since then the trial has taken place, and the plaintiff has a verdict.

I have already expressed my opinion that upon the matters appearing at the trial, the plaintiff was entitled to recover in respect of his interest as mortgagee, and that the verdict should be reduced to that amount and interest; that so much in fact of the defendants' rule should be made absolute, and I think, also, the defendants should not be put to the costs of that application.

But on the demurrer, I am clear the plaintiff is entitled to judgment. And I do not see how we can grant the pre-

sent application to amend. We feel that on the facts brought out at *nisi prius*, the plaintiff should himself be entitled to recover as mortgagee, and no new matter is now before us to lead to a contrary conclusion. It is not sworn that the plea, if altered as it is proposed to alter it, would then be true. We are not informed, in the only way in which we can act upon the information, when this matter of defence arose, or whether it is such matter of defence as would or would not come within the 118th sec. of the Common Law Procedure Act of 1856, as arising after the last pleading; or if it arose before the declaration was filed, but after the commencement of the suit, why it was pleaded as arising before action brought? In the absence of any new matter, and considering that the application is after verdict, and no merits are shewn, I do not see how we can grant leave to amend. The new trial was moved on grounds wholly independent of those set forth in this plea, and though, if moved on affidavit of such facts, and coupled with a motion to amend, both might have been granted on terms; such is not the present application, and to the plea as it stands on the record, the replication is, I think, a good answer. In fact the demurrer was given up, and the plaintiff is entitled to judgment on it.

Galt then pressed strongly that he might have leave to apply to a judge at chambers for leave to amend; and the court ordered that he might apply within fourteen days, and if no leave granted, plaintiff to have judgment on the demurrer; and they directed that no rule discharging the rule for a new trial should issue until the application to amend had been disposed of, provided it was made within fourteen days; and if it were granted, that such rule should not issue without further application to the court.

MACDONALD V. WOOD.

Admissions—Evidence.

“M.” by letter admitted that certain property, the subject matter in dispute, was in the hands of a third party, and afterwards brought his action against the defendant for it. *Held*, that such letter was evidence in the cause, and the jury having found, upon it, for the defendant, the court ought not to disturb their finding.

Sittings after Michaelmas Term, 22 Vic., 1858.

The declaration contained several counts—1. For not accounting for proceeds of oil sold by defendant for plaintiff. 2. That although defendant accounted for two barrels, out of twelve left with him by plaintiff, yet he has refused to render an account of the residue. 3. For not taking care of the oil. 4. For selling oil to an insolvent person, without getting pay or security. 5. Money had and received, and account stated.

Pleas—1. Non-assumpsit to first four counts. 2. Denies delivery of goods in first count. 3. Denies delivery of goods in second count. 4. Defendant had not the care of the goods in third count. 5. Denying retained to sell as in the fourth count. 6. To residue of declaration, never indebted. Issue is joined on all these pleas.

The cause came on for trial before *Richards, J.*, at the last fall assizes for the united counties of Stormont, Dundas, and Glengarry. The only witness the plaintiff called was his brother, who proved that the oil in question was ordered for a Mr. Carpenter of Hamilton, in the fall of 1856: that Carpenter, through his clerks, objected to the quality of the oil, and declined receiving it, and that the sale to Carpenter was rescinded; but the oil remained in his custody until the winter of 1857, when he saw defendant in Hamilton, who told him he had received the oil from Carpenter, and held it for plaintiff. It was arranged between them that defendant might sell the oil for 5s. a gallon, guaranteeing the sale, and he was to get five per cent. commission. He further stated his brother afterwards sold two barrels to parties in Port Hope, and they were sent forward by defendant: that defendant told him the two barrels had been delivered to Tisdale to be forwarded. Defendant never accounted for the other ten barrels, and last spring denied ever having heard of the oil, and refused to account for them. There were four hundred and two gallons of the oil in the ten barrels. It was worth 5s. a gallon in Hamilton. On cross-examination, he stated Carpenter told him in the winter of 1856 and 1857 that defendant had the oil, and in consequence of that he went to defendant. Plaintiff did not charge the oil to defendant on the return of the witness to

Montreal, after defendant said he would hold it for plaintiff. He did not know if there was any discharge of Carpenter for this oil in plaintiff's books : that it is likely they may have written to Carpenter for the oil : considered Carpenter morally, if not legally, bound to see the oil delivered, or to pay for it ; either to pay for it, or to deliver it to Wood. He further stated, when the letter of 11th of June, 1857, was shewn him, that Wood had the physical possession of the oil, but Carpenter was to look after it : that Carpenter was in such a position he could not have it in his possession, because he was insolvent, and it would be liable for his debts. It was put in Wood's hands because it would be liable for Carpenter's debts. He never saw it in Wood's possession, but supposed he had it from what was said. Plaintiff referred to Carpenter as a friend : the oil would have been left in his hands for plaintiff if it had been safe.

Defendant put in a letter, written by the last witness, for plaintiff, dated 10th of June, 1857, directed to Mr. Tisdale, of Hamilton, in which he says : " I sent to Mr. Carpenter twelve barrels of oil, that are now in his hands, subject to order. Would you have the goodness to have two barrels shipped to S. & B., Port Hope." He concludes by saying " he will arrange Tisdale's charge, when next in Hamilton, some time in July." It further clearly appeared that the oil in question never was in defendant's possession. It was at one time stored in the cellar of the premises that had been occupied by Carpenter. When the latter sold out his stock to McKinstry, his former clerk, McKinstry had the right to reject out of the stock goods to the value of £2,000. These goods so rejected were placed in defendant's premises for Carpenter, and Carpenter supposed the oil in dispute was there also. The sale to McKinstry was in the fall of 1856 or beginning of 1857. Carpenter told plaintiff's brother in the winter of 1856 the oil was in defendant's possession. Carpenter never intended to accept the oil, as his clerk said it was not the kind ordered, and never did accept it as purchased by him from plaintiff. After the sale to McKinstry the oil remained in his cellar, but it was in the way, and his porter removed it and placed it, in January, 1857, in a

bonded warehouse that had been previously leased by Carpenter, and which had not been given up to the lessor. The two barrels were delivered by the porter to Tisdale's man from this bonded warehouse by order of Carpenter's assignees. The remaining ten barrels were sent by the order of the assignees to the auction room, and sold.

The learned judge told the jury if the defendant acknowledged the oil was in his possession, and that he agreed to hold and dispose of it for the benefit of the plaintiff, then defendant is estopped from shewing it was not in his possession, if plaintiff's position in relation to it was altered so as to be prejudicially affected by his reliance on such admission. Plaintiff's witness had said if defendant had not acknowledged the oil to have been in his possession he would have taken it away and placed it with some other person. The jury found a verdict for defendant. The counsel for defendant objected, that the judge should have directed the attention of the jury to the fact that two of the barrels of oil had been delivered to Tisdale on plaintiff's order, and that they should presume that he had informed plaintiff that he had got the oil from Carpenter's assignees; and if he had applied to them for it he would have received it. That defendant ought not to be liable, as plaintiff would thus know the oil was not in defendant's possession, and by applying could have got it, and therefore did not suffer from any reliance on defendant's statement that he had the oil.

Brough, Q. C., obtained a rule *nisi* for a new trial, the verdict being contrary to law and evidence and the judge's charge. During the term *Freeman*, Q. C., shewed cause, and contended that the verdict was right. The jury did not believe the witness, or at all events, did not think plaintiff's position was altered to his prejudice by any thing defendant had said. That in June, 1857, plaintiff himself had recognised the oil as being in the possession of Carpenter, and had actually obtained two barrels of it out of that possession, and could have got the rest if he had applied for it then, and therefore the jury might well say that the plaintiff's position was not in the least changed by relying on defendant's state-

ments, if they were ever made in the way related by witness. That his own letter shews he well knew the oil was in Carpenter's possession long after the time defendant is said to have told him he had it. That as a matter of fact defendant never did have it in his possession, and it will be doing him great injustice to allow the plaintiff to recover against him when he can bring his action against the assignees, and recover against them, as it clearly appears from Carpenter's evidence that the property in the oil never passed to him.

Brough, Q. C., contra, contended that the evidence shewed clearly that the defendant admitted he had the oil in his possession. Mr. Carpenter himself stated that he told the witness that defendant had it, and the circumstances tend strongly to corroborate the witnesses' statement that the defendant undertook to hold and sell the oil for plaintiff, otherwise it would have been very easy to have deposited the oil with some third person, when there would have been no dispute about it. That the jury ought to have found for the plaintiff, and there should be a new trial.

RICHARDS, J., delivered the judgment of the court.

If the verdict had been the other way, we should not have felt disposed to disturb it. The plaintiff does not complain that the charge of the judge was not as favourable to him as he could desire. There is nothing to shew that defendant could have any object in not carrying out the arrangement to take charge of and sell the oil for the plaintiff, if such an arrangement was made. He may have forgotten it, never having in any way had the matter brought to his notice for more than a year; and the oil itself not having been in his possession. If he has to pay for it he will lose a considerable sum of money, for which he has received no value.

If the plaintiff, in June 1857, had directed Mr. Tisdale to call on the defendant for the oil, and had mentioned that it was in his possession, and that he held it for him, then the defendant would have had some notice that he was considered responsible for it. But the plaintiff himself, stating expressly that the oil was then in Carpenter's hands, subject to his order, may have induced the jury to suppose there was

some mistake about defendant's admitting the oil to have been in his possession, and may have found for defendant on that ground. Or the jury may have supposed that the plaintiff himself had discovered that the oil was not really in defendant's possession, and knowing that it was in Carpenter's, gave the order to get the two barrels from him, and chose to allow the rest to remain there until he made sale of it; and in this view he would not be prejudiced by the defendant's admission that he held the oil for him, inasmuch as he himself would have been informed of the mistake, and by his own act permitted it to remain with Carpenter, from which he afterwards suffered the damage. If this were really the case I am not prepared to say that the plaintiff should recover. The jury have found for the defendant, and there are grounds on which I think their verdict may be sustained; and if the property in the oil never passed to Carpenter, plaintiff may still have his remedy against the assignees. The rule therefore must be discharged.

Per Cur.—Rule discharged.

WALDIE V. GRANGE, SHERIFF.

Assignment—Change of possession—Fi. fa.

Held, that it is not a question of law, but a matter for the decision of the jury, under all the circumstances, whether there has been an immediate and continuous change of possession, under an assignment, sufficient to satisfy the statute.

The declaration states that defendant seized and covenanted to his own use plaintiff's goods, to wit, all the goods, chattels, wares, merchandise, stock in trade, and furniture, which, on the 3rd of December, 1857, were in and upon the shop and premises in the village of Elora, before then lately in the occupation of one John Bunten. Pleas—1st. Not guilty. 2nd. Goods, &c., not the plaintiff's. 3rd. That heretofore, and before, &c., John Hogg recovered judgment against John Bunten and Thomas Williams, for £99 7s. 3d. damages and costs in an action on promises; on which the said J. H. sued out a *fi. fa.* directed to defendant, sheriff of Wellington, commanding him of the goods of John Bunten and Thomas Williams he should cause to be made, &c.,

endorsed to levy, &c., and delivered to defendant to be executed: that defendant, after the delivery to him, and before the return of the writ, seized and sold of the goods and chattels in the declaration mentioned, then being the goods, &c., of the said John Bunten, sufficient to satisfy the amount directed to be levied as he lawfully might. Issue on the first and second pleas. Replication to the third, admitting the issuing and delivery of the writ, &c., *de injuriâ absque residuo causæ*. Issue.

The trial took place in November last, at Guelph, before the *Chief Justice* of Upper Canada. The plaintiff's title was an assignment of the real and personal property, covering the goods seized and costs, made by John Bunten to plaintiff upon trust for the benefit of his, Bunten's, creditors, and executed by Bunten and the plaintiff, and afterwards by several of Bunten's creditors. A great deal of evidence was given on both sides: on the plaintiff's part to establish the *bona fides* of the assignment, and the fact of immediate delivery and continued change of possession; and on the defendants' part, to impeach the validity of the assignment as merely colourable, to protect the goods from Bunten's creditors, but really to leave them under his control or to preserve them for his use, and to shew that he remained in possession of, and with a disposing power, over them. At the close of plaintiff's case it was objected, that there was no evidence of change of possession. The learned Chief Justice held there was evidence which he must submit to the jury, reserving leave to the defendants' counsel to move on this objection; and the charge of the Chief Justice was excepted to, on the ground that he should have decided, as a matter of law, whether the statute, requiring an immediate delivery, and a continuous change of possession, had been complied with, instead of leaving these as facts to the jury. The bill of sale not having been filed with the clerk of the county court, rendered the change of possession indispensable. The jury, after a charge in which the circumstances calculated to throw suspicion on the bill of sale were fully adverted to, and the evidence gone over with comments on its bearing, found for the plaintiff.

In Michaelmas Term *McMichael* obtained a rule *nisi* to enter a nonsuit on the leave reserved, or for a new trial on the law and evidence, and for misdirection.

Freeman, Q. C., shewed cause. He referred to *Marvin v. Wallis*, 6 E. & B. 726.

DRAPER, C. J., delivered the judgment of the court.

The court granted the rule to shew cause why a nonsuit should not be entered, rather because the learned *Chief Justice* had reserved leave to move, more than from any strong doubt, but that he had rightly overruled the objection. Having again carefully gone over the evidence, I am quite satisfied that there was no ground to nonsuit; that there was abundant evidence, if the jury believed it, to establish a delivery and a change of possession. Neither do I think that the defendant has any ground to complain of the direction. Every circumstance which could properly give rise to a doubt of the good faith of the transaction was fairly brought under their notice, and, as far as I gather from the report, in a manner less favourable to the plaintiff than to the defendant. And the learned Chief Justice allowed John Hogg, the execution creditor, to be examined as a witness for the defence, although he admitted that he had indemnified the sheriff; so that his testimony went to the jury to impeach the assignment, which, in order to sustain his own execution, he was manifestly interested in defeating. The admissibility of his evidence was objected to at the trial, and if the verdict had been for the defendant I have no doubt the objection would have been renewed, on a motion for a new trial.

On a full consideration of the case, I think the rule must be discharged. There were doubtful circumstances and conflicting evidence, not, however, as I think, very strongly preponderating either way. The case was left to the jury, with a direction, of which, I think, the defendant has no just reason to complain. Probably, (apart from the question of the admissibility of the witness objected to,) if the verdict had on this evidence been given for the defendant—if the jury had relied upon the evidence given for the defendant in preference to that for the plaintiff, I should have had

less hesitation than I have felt in coming to a conclusion to discharge the rule. But the matter was for the jury, and I do not see any sufficient reason to disturb their conclusion.

Rule discharged.

MULHERNE V. FORTUNE ET AL.

Tenancy—Emblements—When entitled to them.

Where a party entered into possession, and sowed a crop upon a verbal understanding that he should have the products thereof, but no special time for occupation was mentioned.

Held, that a sufficient tenancy was created to entitle him thereto.

TROVER for wheat and straw. Pleas.—Not guilty. Goods not plaintiff's.

The case was tried at Cobourg, in October last, before *McLean*, J. It appeared that the plaintiff's father, up to the 20th of November, 1857, owned lot No. 7, 9th concession Haldimand. There was no house or building thereon. In the winter of 1856–7 the brother of the plaintiff, by their father's authority, chopped twenty acres or more on this lot. In July, 1857, plaintiff was told by his father that he had better go and clear up the land that had been chopped; that his brothers would assist him, and that he, the father, would give him seed. Plaintiff did so, and his father assisted him in clearing. The father said plaintiff was to have the crop—to have the land for a year, and if he managed it well, he should have it altogether. Plaintiff put wheat in the ground in the latter part of September and in October, and then left it. It was not then fenced, but there were rails cut, taken out, and near the premises. The land was under mortgage, and on the 20th of November, 1857, the father sold and conveyed it to defendant Craig. He swore there was to have been an agreement signed, reserving the wheat, but another person who was present denied this. On cross-examination this witness (the father) admitted that he was indebted, and that one H. McC. had judgment and execution against him for £28, when he made this arrangement with plaintiff. He also said in cross-examination, the plaintiff was to have the wheat off the lot, and that no particular time was mentioned for which he was to have the

lot. Plaintiff did not pay any rent, and nothing was said about his paying any rent. It was understood that if plaintiff managed the land well he would continue in possession. The wheat was fenced after the land was conveyed to defendant Craig by a Mr. Grimshaw, to whom defendant Craig had sold it. Plaintiff, with some others, went to harvest the wheat, when defendant Craig prevented him, and on the same day the wheat was seized by the sheriff's officer (Fortune being sheriff) on the execution in favour of defendant Craig against plaintiff's father, and was sold. This action being brought to recover its value. The statement of plaintiff's father was confirmed by one of plaintiff's brothers.

A nonsuit was moved for on the ground that there was no tenancy existing on the part of the plaintiff; that his occupancy was nothing more than a tenancy at will, which could have been put an end to at any time by plaintiff's father, and it was terminated, by the father's conveyance to defendant Craig. It was admitted that defendant Craig directed the sheriff to seize this wheat, and the wheat was afterwards thrashed out in his barn.

Leave was reserved to the defendants to move for a nonsuit, and the jury found for the plaintiff.

Reade, D. B., in Michaelmas Term, obtained a rule *nisi* for a nonsuit on the leave reserved, contending that the wheat had passed to the defendant Craig, by the conveyance of the 20th of November, 1857, or that at all events the plaintiff had no property in it.

Galt shewed cause, contending that plaintiff was certainly a tenant at will, and therefore was entitled to emblements.

Reade, contra, cited *Evans v. Roberts*, 5 B. & C. 829; *Emerson v. Heelis*, 2 Taunt 38; *Crosby v. Wadsworth*, 6 Ea. 602; *Carrington v. Roots*, 2 M. & W. 248; contending that no tenancy was created, and that as a contract for the sale of goods not in existence at the time, or as a contract for the sale of an interest in the land, it was void for not being in writing.

DRAPER, C. J., delivered the judgment of the court.

I think there was neither a contract for the sale of goods

not *in esse*, nor of an interest in land. Nothing of the sort seems to have been in the contemplation of the parties. The plaintiff was either a tenant, or he had no interest at all. According to the evidence in chief of the father, the plaintiff was to have the land for a year, though on cross-examination he said that plaintiff was to have the wheat off the lot, but no particular time was mentioned for which he was to have the lot; that he did not pay any rent, and nothing was said about his paying rent. It was understood that if plaintiff managed the land well he would continue in possession. The jury may have inferred from this testimony, that he was to have the portion which he cleared for a year at all events—possibly for more; but they could not doubt, if they believed the witnesses, that he was to have it for the purpose of putting in a crop, and was to have the crop he put in, and that he entered into possession accordingly, and did put the crop in. The defendant Craig does not seem to have relied on his purchase of the crop, as a part of his purchase of the land, for if so, he would scarcely have taken out an execution, and directed the sheriff to levy on this wheat as belonging to the plaintiff's father. I think there was sufficient evidence, that the plaintiff was a tenant so as to entitle him to the crop, to go to the jury. If they had supposed the whole a scheme to protect the wheat, being the father's, from the father's creditors, they would have found for the defendants; but although some evidence was given which would seem to have been offered with that object, the defence was ultimately rested on the conveyance passing the wheat with the land, and more particularly on the motion for nonsuit, which is the only matter before us now.

I think the defendant is not entitled to succeed on the application.

Per Cur.—Rule discharged.

See *Tress v. Savage*, 4 E. & B. 36; Co. Litt. 55 *a.*; *Vouchst*, 244, 471; *Campbell v. Cushinson*, 4 U. C. Q. B. 9.

ANDREW DONOGH *qui tam*. v. JOHN LONGWORTH, ESQ.

Held, that a justice of the peace is liable under the statute to a separate penalty of £20 for each conviction, of which a return is not properly made to the quarter sessions; and,

That an action for the penalty would lie, on proof of the conviction and fine imposed, although no record thereof had been made by the justice.

The plaintiff sued as well for himself as for the receiver-general. The declaration set forth a by-law of the town council, of the town of Goderich, and stated that one Robert Gibbons was convicted by and before the defendant, then and from thence hitherto being one of her Majesty's justices of the peace, of a breach of the by-law, and was adjudged by the defendant to pay a fine of 10s., with 14s. 6d. costs, and it thereupon became the defendant's duty to make a due return of the said conviction, in writing, under his hand, to the then next ensuing general quarter sessions of the peace, for the united counties of Huron and Bruce; yet defendant neglected to make such return, contrary to the statute, whereby and by force of the statute, the defendant hath forfeited £20, and an action hath accrued. The second count was of a similar character, for not making a return of the conviction of one Andrew Johnston, for a breach of the same by-law, whereby Johnston was adjudged to pay a fine of 10s., and 14s. 6d. costs. The third count was of a similar character, for not making a return of the conviction of the plaintiff for a breach of the same by-law, whereby plaintiff was adjudged to pay the sum of £5, including all costs; and the plaintiff claimed for himself and her Majesty's receiver-general £60, being the amount of the three several sums of £20 each. Plea.—Not guilty.

The case was tried at the last assizes for the united counties of Huron and Bruce, before *Burns, J.* The fact that the three parties named in the three counts of the declaration were severally convicted (all on the same day) by the defendant, as alleged, was proved. Neither of them appealed against the conviction. Each of them was committed to gaol, and then paid the amount adjudged. No return of these convictions, for publication, was made according to the act. The convictions themselves were sent by post to the office of the clerk of the peace in Goderich, and were filed

on the 30th of June, 1857, and all bear date on the 20th of May, 1857. The warrants of commitment were dated also on the 20th of May, 1857. It was objected, that as there was no seal to the convictions produced, they did not prove the fact of any conviction: that there is no proof that the defendant acted as a justice of the peace. And the suit was improperly brought by the plaintiff *qui tam* for himself and the receiver-general.

The learned judge overruled all the objections, reserving leave to defendants to move, and the jury gave a verdict for the plaintiff for £20 on each count.

In Michaelmas Term, *C. Robinson* obtained a rule *nisi* to enter a nonsuit on the leave reserved, or for a new trial, on the ground that the defendant was only bound to make one return of all these convictions—one schedule in the form given by the statute, which would include the whole, and therefore that he only became liable to one penalty of £20 for not making this return.

S. Richards shewed cause. He argued that the word “conviction,” in the statute, meant the act of convicting, the adjudicating upon the matter before the justice. The record of such act might be made at any time afterwards. The statute requires, not the mere return of a record, but a return of the fact of a conviction being made. When the justice receives the fines, he cannot say there has been no conviction. Any defect in the record of conviction which was returned, would only tend to establish that the justice had not, so far at least, made a return; but the fact of a conviction might be established, without producing a formal record. In *O'Reilly q. t. v. Allan*, 11 U. C. Q. B. 411, the court held that the justices were bound to make a return pursuant to the act, though the conviction itself could not legally have been made. As to the argument that only one return was necessary, the defendant should make his return of each sum as he receives it, and therefore should return each conviction.

C. Robinson, contra, urged, that the statute should not be construed strictly in order to subject the defendant to a penalty: that there must be something amounting, in law, to

a conviction before the defendant became bound to make a return of it ; and that the evidence did not go far enough to establish this. But he relied mainly on the objection that only one penalty of £20 could be recovered. The statute only required a return of convictions made before a single justice, to be made to the next ensuing court of general quarter sessions ; whereas the return is required to be immediate, if the conviction be before two or more justices. A single justice might therefore wait till the last moment and make up one schedule or return, including all the convictions had before him, since the last preceding general quarter sessions. He referred to *Metcalf q. t. v. Reeve and Gardner*, 9 U. C. Q. B. 264 ; *Paley on Convictions*, 126, 16 Vic., 178.

DRAPER, C. J., delivered the judgment of the court.

The preamble to the act 4 & 5 Vic., ch. 12, shews that the return required to be made was a distinct thing from the convictions themselves. It recites that it is necessary that justices "shall, together with the convictions, make a due return thereof to the general quarter sessions of the peace, of the district in which such penalties, fines, and damages have accrued, in the manner and form set forth in the schedule hereunto annexed."

The first section enacts, that it shall be the duty of every justice of the peace before whom any trial or hearing shall be had under any law, now or hereafter to be in force ; giving jurisdiction in the premises, and imposing any fines, forfeitures, penalties, or damages upon the defendant or defendants, in case any conviction shall ensue thereon, to make a due return thereof in writing, under his hand, to the next ensuing general quarter sessions of the peace for the district in which such conviction shall have taken place, and of the receipt and application by him of the moneys received of any such defendant or defendants ; such return to be filed by the clerk of the peace with the records of his office.

By sec. 2, in case any justice or justices before whom any such conviction shall have taken place, or who shall have received any such moneys, shall neglect or refuse to make

such due return in the manner and forms, &c., or shall wilfully make a false, partial, or incorrect return, or shall wilfully receive a larger amount of fees than is by law authorised; such justice or justices, and each and every of them, so neglecting, &c., or &c., shall forfeit and pay the sum of twenty pounds, together with full costs of suit to be recovered by any person or persons who sue for the same, by bill, complaint, or information, in any court of record, one moiety of which sum of £20 shall be paid to the party suing, and the other moiety shall be paid into the hands of her Majesty's receiver-general for the public uses of the province.

By sec. 3, all prosecutions for penalties under this act shall be commenced within six months after the cause of action shall have accrued, and shall be tried in the district wherein such penalties shall have accrued, if plaintiff fail, defendant to recover costs as between attorney and client.

I have no doubt, that whether the justice had made up a record of the conviction or not an action for the penalty would lie if he did not make the return required by the statute, and that the proof of his trying a party on a charge within his jurisdiction and adjudging him to pay a fine, &c., would be sufficient. In the present case there is evidence of that fact by each of the parties tried, and in addition thereto that they were committed in default of payment, and actually did pay; and although, to constitute a formal conviction according to the statute 16 Vic., ch. 178, sec. 13, it must be under the hand and seal of the justice, I do not at present see that the instrument drawn up in the form of convictions, though without a seal, on proof of the defendant's writing or signature thereto, would not be evidence as against him of the facts therein contained.

I have felt more doubt as to the recovery of the three separate penalties, because I am convinced that if the defendant had made one return in the form given in the schedule to the act, including therein each of the three convictions mentioned in the declaration, with the details called for by the form, this would have been a compliance with the statute, and if one such return would be enough, it may be asked why more than one penalty for the not making it should be incurred.

But in answer, it must be remembered, that the omission of any one conviction from the return, would subject the justice to the penalty, though he had returned all but one, for he is to make a return of "any" (which I construe every) conviction had before him. And though "he incurs a like penalty for making a false, partial, or incorrect return," I think these words do not point to a return from which a conviction is wholly omitted, but to some wilful defect or misstatement in regard to the conviction or convictions of which a return is made in apparent compliance with the statute.

Besides, in the present instance, if each of the parties convicted, (or any other party,) had brought an action charging only one conviction, and the absence of any return thereof, and claiming one penalty on that account, I do not see how the defendant could avail himself of the pendency of any one of such actions, or even the recovery therein, in bar of any other of them, for the breach of duty alleged in each would be different, and if the due return of one would be no bar to an action for not returning another, which I think it would not, then I do not see how, being sued for not making a return of one conviction could be any answer to another action for not making a return of another, and if not, I do not see why any number of penalties for distinct breaches of duty may not be recovered in one action.

I think the rule must be discharged.

Per cur.—Rule discharged.

HAACKE V. MARR.

Distress—Replevin—School rates.

Held, that a party avowing for distress in the levying of a school rate, the by-law for sanctioning such levy requiring to be passed upon the request or with the consent of certain persons, must shew such request to have been made, or such concurrence or consent obtained.

Held also, that upon such avowry, the avowant must set forth the conditions precedent required by law to be complied with before the passing a by-law to levy a rate for school purposes.

REPLEVIN for a bay horse.

Avowry.—That defendant was collector of school rates for school section No. 11, Township of Markham, within which plaintiff resided, and was liable to be and was rated on the

assessment roll for the year 1857, as a rate-payer. That by a by-law of the township, passed the 28th September, 1857, it was enacted, that there should be levied and collected from the rateable property in the said school section, for school purposes for the said year, the sum of £68 5s., and that the clerk of the municipality should make provision on the collector's roll for that purpose, and that the collector for the east half of the township should collect the same with the other township rates, and when so collected should pay the same over into the hands of the trustees of the said school section after retaining thereout four per cent. on the sum so collected to defray the expense of collecting. That in pursuance of the by-law, the clerk did, in the month of September, duly make provision on the said collectors' roll for the rate aforesaid, and thereby plaintiff was rated and required to pay £5, which was his fair and proper rate. That defendant was the collector of rates for the east half of the said township, and as such the roll was delivered to them that he might collect the rate. That during the year 1857, he called on plaintiff and requested him to pay, which plaintiff refused. Wherefore, within sec. 11, where plaintiff resided, as and in the name of a distress for the said school rate remaining unpaid, he seized the said horse, &c., to levy the said rate.

Demurrer.—Because it is not shewn that the municipal council was requested to levy the rate in the by-law mentioned, nor for what purpose it was levied, nor that the council had authority to pass it. There were other objections suggested, but not argued.

Eccles, Q. C., for plaintiff, cited *Ness v. Municipality of Saltfleet*, 13 Q. B. 408; *Brown v. The Municipality of York*, 8 Q. B. U. C. 586.

M. C. Cameron, contra, *Dennis v. Hughes*, 8 U. C. 444; *Brown v. Municipality of York*, 9 U. C. Q. B. 453; 13 & 14 Vic., ch. 48, sec. 1; 11 Ad. & E. 993 *Charlton v. Aldway*.

DRAPER, C. J., delivered the judgment of the court.

If the authority of the municipal council to pass this by-law was to be exercised directly and immediately under

the statutes of the province, without any condition precedent necessarily interposing before the authority could be lawfully exercised, then the by-law passed immediately under such authority, and within its scope, would by itself protect and justify these officers whose duty it was to carry it into effect. In such a case, it would not, I think, be necessary, even in an avowry to set out more than the by-law, and to shew that the act complained of was authorised or commanded by it.

But, although authority be given to pass a by-law for any particular purpose, if that authority can only be exercised, either upon the request, or with the concurrence or consent of other parties, then I apprehend, that a party avowing for a distress taken to enforce payment of any rate imposed by the by-law, must shew not merely that the by-law was passed, but that it was passed upon such request, or with such concurrence or consent.

A distinction is taken between a justification to an action of trespass, and an avowry. In trespass it is sufficient for the defendant to allege in his plea matter to excuse the trespass, but in replevin, the avowal is in the nature of a plaintiff, for he is to have a return, and therefore the avowry, which is in the nature of a declaration, must shew a good title *in omnibus*, and contain sufficient matter to entitle him to a return. Thus, in trespass, if the defendant justify for an amercement in a court he must set forth a warrant, for he is a wrong-doer unless he acted by virtue of a warrant; but it is not necessary to aver the matter of the presentment, because, as to him, it is immaterial whether the offence was committed or not, so there was a presentment, and his plea is only to excuse the wrong; but in an avowry the defendant ought to aver in fact that the plaintiff committed the offence for which he was amerced, because he is an actor, and has to recover, which can only be upon the merits. 1 Wm. Sanders, 347, note 3, citing Goodman v. Ayling, Yelv. 148; Matthews v. Carey, Carth. 74, 1 Salk. 107; 7 Co. 25 a.

Mr. Eccles argued that replevin would not lie for such a distress, but for our act, which gives replevin wherever trespass or trover will lie; and therefore this action was to be

treated as if in form an action of trespass, and as a consequence, that whatever would be a good plea in justification, in trespass would constitute a good avowry.

I cannot accede to the argument, first, because I do not see that the nature of a replevin is altered, because the statute may extend it to cases where it was not considered that it would lie before. The avowant is still an actor, and if successful, is still entitled to a return ; and therefore it must be as necessary for him to make a good title *in omnibus* in cases under the act as in cases at common law. And, secondly, I think the weight of authority shews that replevin would lie in this case, although our statute had not been passed. I refer to *George v. Chambers*, (11 M. & W. 149,) affirmed in *Allen v. Sharp* (2 Exch. 352,) and in *Jones v. Johnson* (5 Exch. 862), which last case was upheld in error, (16 Jur. 840 ; 7 Exch. 452), *Morell v. Harvey* (4 A. & E. 684,) *Morrell v. Martin* (3 M. & Gr. 581,) *Selby v. Bardons*, (3 B. & Ad. 2), *Governor of Poor of Bristol v. Wait* (5 A. & E. 1,) *Fenton v. Boyle* (2 N. R. 399.)

The only remaining question is, whether the by-law as pleaded, shews a sufficient authority.

Upon the best consideration I can give the matter, I think it does not. I look upon the powers conferred upon municipal councils to levy rates for school purposes within school section as auxiliary to the carrying out of the school acts.

The language of the 12 Vic., ch. 81, sec. 31, 3rdly, may seem to confer an entirely independent authority for the purposes specified. But during that same session, a school act was passed, (ch. 83,) by the 30th section whereof (3rdly) the exercise of this authority was plainly limited, for though no rate could be levied for building a school house, or for purchasing a site for a school house, except by a by-law of the municipal council, that body could not impose the rate, unless a memorial praying for it was signed by a majority of the land-holders and house-holders of the section, and was submitted to the council. And (6thly) the powers to pass a by-law to support the common school, or as expressed in 12 Vic., for the establishment and support of schools according to law, is not to be exercised, unless the majority of the

land-holders and house-holders have determined to support the common schools by a tax. Other limitations are imposed by sec. 38 of that act. And the only duty to levy a rate that was unrestrictedly imposed in that act, was for raising a sum for teachers equal to that given by government for the same purpose. This latter act, ch. 83, was repeated in the following year, but restrictions on the power of the municipal councils were contained in the substituted school acts, as in 13 & 14 Vic., ch. 48, sec. 12, 9thly, by implication, in sec. 18, of the same act, (7thly) and in sec. 17, of 16 Vic., ch. 185.

It appears to me, therefore, that this avowry does not go far enough, but that the condition precedent to the exercise of the power to pass a by-law to levy a rate for school purposes within the section, should have been set forth, and that the plaintiff is entitled to our judgment on this demurrer.

It becomes unnecessary to consider any further the grounds of the plaintiff's application for a new trial. The verdict for the defendant cannot create any absolute bar to the plaintiff's recovery, when the avowry on which it is founded is insufficient in law. It will be for the plaintiff to consider what course he must adopt to get rid of the effect of the omission to assess contingent damages on the demurrer; if he had done that and had treated the avowry as his demurrer treated it, as containing no legal answer to his action, he might have moved for judgment *non obstante*. We do not, however, discharge the rule for a new trial. It is better to leave that pending until plaintiff takes some step to get the benefit of the judgment in his favour on the demurrer.

Judgment for plaintiff on demurrer.

See 12 Vic., ch. 81, sec. 31, 3rdly, and sec. 155; 13 & 14 Vic., ch. 48, sec. 12 sub-sec. 9; 13 & 14 Vic., ch. 64, sch. A., No. 26; 14 & 15 Vic., ch. 109, sch. A. No. 21; 16 Vic., ch. 182, sec. 39; and ch. 185, secs. 17 and 25; 22 Vic., ch. 99, sec. 259; *Wilson v. Weller*, 1 B. & B. 57; *Pearson v. Roberts*, Willis, 668; *Fletcher v. Wilkins*, 6 Ea. 283; *Banks v. Brand* 3 M. & S. 525; *Fenton v. Boyle*, 2 N. R. 399; *George v. Chambers*, 11 M. & W. 149; *Allen v. Sharp*, 2 Exch. 352.

TYAS ET AL. V. MACMASTER.

Creditors—Assignment for benefit of—Preferred.

Held, that the recitals in an assignment for the benefit of creditors, which used the single instead of the plural number, and an affidavit which stated that "the conveyance was not for the purpose of enabling the bargainee to hold, &c," there being two bargainees, did not vitiate the instrument.

INTERPLEADER issue brought to try whether certain goods seized and taken in execution by the sheriff of the county of Middlesex, tested the 15th of April, 1858, and delivered to the sheriff on the 16 of April, 1858, for the having execution of a judgment of the Court of Common Pleas, recovered by defendant at his suit against James L. Williams, were at the time of the delivery of the writ the property of plaintiffs as against defendant. The trial took place at the Middlesex assizes in Nov., 1858, before *Burns, J.* The plaintiffs put in a copy of, and proved an indenture dated the 16th of March, 1858, made by James L. Williams, of the first part, and themselves of the second part, and the several parties who should become parties thereto, as thereafter mentioned, of the third part. It recited that the party of the third part was indebted, and was possessed of the goods, &c., mentioned in schedule A., and was unable to meet his liabilities, and had offered to convey to plaintiffs for their benefit, and for the benefit of such creditors as should execute, the property mentioned in schedule A., and that the plaintiffs, and the parties of the third part, have agreed to accept the assignment in full satisfaction of the debts owing to them by J. L. Williams, and witnessed that in consideration of the premises and of five shillings, the said J. L. Williams hath granted, bargained, sold, assigned, transferred and conveyed all the goods, &c., in schedule A., *habendum* in trust, 1st, to pay the expenses of the assignment, and of carrying it out, and a reasonable compensation to the assignees for their trouble. 2. To pay the creditors named in schedule B their claims, amounting to £676 14s. 3. To pay, share and share alike, the creditors named in schedule C. And with respect to real property the same is to be conveyed to plaintiffs for the same purposes. The plaintiffs to have power to take immediate possession, convert into money, and dispose of the

property, real and personal. The residue, if any, to be returned to J. L. Williams. The plaintiffs accept the trusts. The plaintiffs, and the parties of the third part release J. L. Williams from all demands. And any creditor named in schedule B. or C., who on receiving notice of the assignment, shall neglect or refuse to take the benefit of it, and shall not within one month become parties thereto, the assignment and the trusts and provisions thereof shall stand for the use and benefit of the creditors who shall execute. The defendant's name was in schedule C., but the amount was specified to be £600.

This assignment was filed in the office of the clerk of the county court, on the 16th of March, 1858. George Tyas, one of the plaintiffs, made an affidavit attached thereto, "that the sale of the property mentioned in the annexed bill of sale or assignment, is *bonâ fide* and for good consideration, as set forth in the said conveyance, and not for the purpose of holding or enabling the bargainee to hold the goods mentioned therein against the creditors of the bargainor."

The plaintiffs then called a witness, who swore he had been Williams' clerk, and became clerk to the plaintiffs on the assignment being executed on the same terms as he had from Williams. That Tyas, on the 16th of March, 1858, took possession, and put the witness into possession for the assignee, and that he remained in possession for a month, when the sheriff seized: that Williams helped in the store after the assignment, selling goods for cash, which cash the witness paid over to plaintiff, Tyas. According to an account book produced and sworn to by this witness, the plaintiff, Tyas, did not appear to be a creditor of Williams, though in schedule A. he is put down as a preferred creditor for £270, and also as endorser of four notes, amounting together to £217 10s. He stated that Williams was son-in-law to plaintiff Tyas. Williams was called as a witness. As to the four notes, he swore that they were given by him to parties to whom he was indebted, and that plaintiff, Tyas, endorsed them for him. He also stated the debt due to the defendant to be £700, and swore to the other debts mentioned in schedule

B. & C. On cross-examination, however, it appeared that of the four notes which Tyas endorsed, three, viz.: Raymond's, Darl's, and Devereux & Young's, amounting to £147 10s., were for debts due to Williams, which notes Tyas, the plaintiff, had endorsed, and apparently they were outstanding in the hands of some third party. And as to the fourth, a note of William Elliot, Williams swore, that at the time of assigning he was sued for a note of £100, which he had endorsed for William Elliot. The preferred claim of Tyas for £270 was also for endorsing notes for Williams, and so was the preferred claim of the other plaintiff, Long.

It was admitted at the trial that the defendant's demand against Williams had amounted altogether to £1200. All the other claims, including the £217 10s., of notes endorsed by Tyas, but on which apparently other parties were liable, amounted to £1025 14s., according to schedules B. & C.

For the defence it was objected, that it recited that the party of the third part was indebted: that the affidavit of Tyas was insufficient: that it stated the conveyance was not for the purpose of enabling the bargainee to hold, &c., when there were two bargainees, and that in other respects it did not comply with the statute. The learned judge overruled the objections, but reserved leave to move upon them. He left the question of *bonâ fides* in making the assignment to the jury, directing them that it would not be void merely on the ground that it preferred some creditors to others, nor that the debt to the defendant was only put down in the schedule at £600, when it amounted to £1200, for the amounts as stated would not bind any one, and this particular amount might have been set right, if the defendant had been willing to come in under the assignment. The jury found for the plaintiffs.

In Michaelmas Term, *Becher*, Q. C., obtained a rule *nisi* for a new trial, the verdict being contrary to law and evidence, and for misdirection, or for a nonsuit on the leave reserved.

J. Wilson, Q. C., shewed cause.

No authorities were cited on either side.

DRAPER, C. J., delivered the judgment of the court.

I think there is nothing in either of the objections taken as grounds of nonsuit. The mistake in the recital cannot vitiate the rest of the deed, which is clear in its meaning, and in itself consistent, apart from this error. It may be rejected as repugnant to the rest of the instrument, and its entire omission will not prejudice the sense and evident meaning of the residue. The use of the singular "bargainee," instead of "bargainees," does not in reality affect the sense, it may be read as meaning either bargainee, for each of the plaintiffs is a bargainee. The fraudulent intention is, I think, fully negatived by the affidavit.

The misdirection complained of is not pointed out in the rule, in conformity with the 168th sec. of the Common Law Procedure Act, 1856; nor indeed is any ground of moving for a new trial stated with sufficient explicitness. No objection was, however, raised on this ground to the rule being argued.

I have no doubt that the defendant has ample and just ground to complain of the conduct of Williams to him, and that the effect of this assignment will be to postpone him, the principal creditor, to all others, for an indefinite period, *i.e.*, until Williams acquires the means of paying something; or perhaps to occasion him to lose the debt altogether, because he has not chosen to yield to Williams' terms, and accept whatever may be divisible among those called general creditors, after the preferred creditors are satisfied; discharging Williams from further liability. But the law did not then warrant us, because the assignment may have that operation, from treating it as void. A debtor is permitted to prefer one creditor to another. He is permitted to dispose of all his effects, and himself apply the proceeds, or to assign all his effects to be sold, and the proceeds applied in payment of particular named creditors, or rateably, making it a condition that no payment be made to any creditor who will not discharge him in full. So long as such a proceeding is not a mere pretence to defeat or delay creditors, a colourable scheme to reserve to his own use the whole or any part of what he professes to assign to pay his debts so long, in short,

as it is truly made for the purpose of paying, and not of delaying or defeating creditors, it cannot be treated as fraudulent, simply because it will operate to the prejudice of a particular creditor, as in the present instance.

It is not for the courts to deal with such a state of things as probably most injurious to commercial dealings and prosperity, or to refuse to give such assignments effect, because in the case of mercantile men unable to meet their engagements, they amount, so far as they operate, to a *quasi* bankrupt law for the particular case, giving the debtor the choice of the assignees, and the regulation of the order of distribution, and operating to coerce his creditors, by the apprehension that if they do not come in under the assignment they will get nothing. We must treat them upon recognised principles and established rules, and if the consequences are mischievous, the legislature must provide the remedy.

I make these observations because of the increasing number of cases of this description, which, as a class, furnish the most numerous subjects of litigation, and must, in the expenses of management, and the costs of suits arising out of, or connected with them, absorb a large amount, which would be better applied in the liquidation of debts due by the assignors.

In the present case, I see no matter of law on which the learned judge should have directed the jury that, as against this defendant, the goods seized by the sheriff were not those of the plaintiffs. And though the direction was objected to, the defendant's counsel has failed to convince me that his objections were tenable.

Upon the question of fact, there were some circumstances of suspicion, especially with reference to the preferred creditors. As I understand the facts, payment of four of the notes by the parties primarily liable, will relieve the amount of preferred claims, and gave a larger surplus to general creditors; but if not paid, the indorser, Tyas, has a right to the preference. It was for the jury to say if the assignment was real or pretended, or designed to effect what it professes, or a fraudulent cloak to cover Williams' effects from his creditors. It is not suggested that any new evidence can

be given, and I do not feel that on this evidence I should be warranted in saying the jury have done wrong, or that it is a case in which, from its whole complexion, I think that for the ends of justice a new trial is necessary.

Rule discharged.

STAYNER V. APPELGATE.

Conveyance—Certificate—Married woman.

Held, that a certificate of a married woman on the back of a deed, which stated that she had been “duly” examined, instead of the words “apart from her husband,” was insufficient, even although it was proved as a fact *dehors* the conveyance that the woman *was* examined apart from her husband.

EJECTMENT for land in Warwick. Trial at the last Sarnia assizes. Plaintiff’s title was—

1. Patent to Elizabeth Hawley, wife of Samuel Hawley, dated the 16th of November, 1835.

2. Deed from Samuel Hawley and Elizabeth his wife, to George Boulton, dated the 16th of June, 1840.

3. Deed from George Boulton to the plaintiff.

The certificate on deed No. 2, stated that Mrs. Hawley was “duly examined,” &c., but did not state that such examination was apart from her husband.

On the trial, at London, before *Burns*, J., one of the certifying magistrates, and the subscribing witness, proved that Mrs. Hawley was examined *apart from her husband*, and that all needful formalities were complied with. The jury so found these facts.

It was objected for the defence that the deed was inoperative for want of the words in the certificate, “*apart from her husband*.”

A verdict was taken for plaintiff, subject to the opinion of the court on this point.

Becher, Q. C., for plaintiff, cited *Jackson v. Robertson*, 4 C. P. U. C. 272; *Allison v. Rednor* 14 Q. B. U. C. 459; *Tiffany v. McCumber*, 13 Q. B. U. C. 159.

S. Richards for defendant, referred to *Jolly v. Hancock*, 7 Exc. 820.

DRAPER, C. J., delivered the judgment of the court.

By 43 Geo. III., ch. 5, the deed of a married woman was to have no force or effect whatever, unless she appeared in open court in B. R., or before a judge thereof at chambers, or before a judge of assize, and was examined, and gave her consent without coercion. Sec. 3 provides for the giving of a certificate, but does not make the validity of the deed to depend upon its being given. The force and effect of the deed is derived from the examination, the certificate merely supplies evidence of it. By this act the examination was required to be within six months after the execution of the deed.

The 59 Geo. III., ch. 3, only altered the law as regarded deeds executed in Upper Canada, by extending the time within which the examination might be made to twelve months.

The 2 Geo. IV., ch. 14, enacts that it should be lawful for any married woman, having real estate in this province, to appear before the quarter sessions of the peace in the district in which she may at the time be resident, or before the general quarter sessions of the peace in any district in this province, in cases in which the party resides out of this province, (see 3 Atk. 503, as to the word party in a statute,) at any time within twelve months after her execution of the deed conveying away her real estate, and being examined by the chairman of the quarter sessions, in open court, touching her consent to alien and depart with her real estate, as in such deed may be mentioned; it shall and may be lawful for the said chairman to certify the same in like manner, as the same may at present be certified by the Court of King's Bench, or any judge thereof, and the said certificate shall have the same force and effect, and be as valid in law, as any certificate given under and by virtue of the act of 43rd Geo. III.

The 1st Will. IV., ch. 3, sec. 5, repeals the 43rd Geo. III. Sec. 1 enables any married woman above the age of twenty-one years, residing within the province, and seised of real estate therein, to alien and convey such real estate by deed, to be executed by her jointly with her husband;

provided always, that such deed *shall not be valid or have any effect, unless* such married woman shall execute the same in presence of one of the judges of the Court of Queen's Bench, or in the presence of a judge of the District Court, or a judge of the Surrogate Court of the district in which such married woman shall reside, or of two justices of the peace for such district, *and unless* such judge or two justices of the peace, (as the case may be,) shall examine such married woman apart from her husband, respecting her free and voluntary consent to alien and depart with her estate as mentioned in the deed, *and shall* on the day of the execution of the deed, certify on the back of the deed, in some form of words to the following effect: "That on the day mentioned in the certificate, such married woman did appear before him or them at the place to be named in the certificate, and being examined by him or them apart from her husband, did appear to give her consent to depart with her estate in the deed mentioned, freely and voluntarily, and without any coercion or fear of coercion on the part of her husband, or of any other person or persons whatsoever."

The 2nd Vic., ch. 6, (passed the 11th of May, 1839,) refers to the foregoing statute, and by section 2 enacts that the certificate to be endorsed on any deed, pursuant to the said act, shall be to the following effect: — do hereby certify, that on this — day of — at — the within deed was duly executed in the presence of — by — wife of — one of the grantors therein named, and that the said — at the said time and place, being examined by — apart from her husband, did appear to give her consent to depart with her estate in the lands mentioned in the said deed, freely and without coercion, or fear of coercion, on the part of her husband or of any other person or persons whatsoever," and that such certificate shall be deemed and taken to be *primâ facie* evidence of the facts contained therein.

The certificate is declared by this last act to be *primâ facie* evidence of the facts contained therein. None of the preceding acts contained any similar provision. The term *primâ facie*, imports at least that the truth of the facts therein contained may be controverted; that it may be

shewn that the assertions therein contained, or some part of them, are not true. If, however, evidence to impeach the truth of the certificate be admissible, so must evidence to sustain it, and the facts whether the married woman was examined apart from her husband, and appeared to consent voluntarily, and whether the certificate was endorsed on the day the deed was executed, and whether the married woman executed it, will be at large on the evidence for the jury.

It is, however, a very different question, whether evidence *dehors* the certificate is admissible to supply the existence of a fact essential to be stated in the certificate, and assuming such evidence to be admissible, and the fact to be found by the jury, the question still remains, whether the defect in the certificate can be thus supplied, and the certificate treated as if the essential fact were contained in it.

If the whole object of the certificate were merely to supply evidence that the formalities of examination as set forth in the act had been complied with, and this apparently was the whole object under the 43rd Geo. III., I should have less difficulty in answering the question affirmatively.

But the statute 1 Wm. IV. enacts that the deed *shall not be valid or have any effect*, unless, 1st. The married woman execute it in the presence of certain judges or justices. 2nd. Unless the judge or justices examine her apart from her husband. 3rd. Unless such judge or justices certify on the back of the deed to the effect, as given in the latter act of 2 Vic.

In the absence of any one of these conditions, the deed is invalid and of no effect, and it must be remembered that but for the statutes the deed would, as to the married woman, be wholly ineffectual. It is an enabling act; but the ability is given on certain conditions. Before the 43rd Geo. III., a married woman, in Upper Canada, was not capable of transferring real property without being a party to a record. Hence the legislature passed that and the succeeding acts to substitute the mode of proceeding pointed out in them.

Now this certificate does not state that the married woman was examined apart from her husband, but it contains a word not employed in the statutes; it says that, "being *duly* ex-

amined," she did appear to give "her consent," &c. The word "duly" not being in the form of certificate contained in the statutes.

I think the fact of examination apart from the husband essential. I think also, that as a fact it must be certified in some form of words, and I think, further, that unless by the word "duly" we can hold that fact to be incorporated in the certificate, the deed must be held of no effect.

Can we then properly hold that the interpretaion of the word "duly" will supply the omission of any fact essential to the examination: that the words "*duly* examined," are *to the effect* (2 Vic., ch. 6, sec. 2,) of "apart from her husband?" If so, then the same word might with equal reason represent the facts that the wife was examined on the day of the execution of the deed, and at the place where it was executed, both which particulars are required to be certified in relation to the examination of the married woman. And then the further question would arise, whether a certificate following the statute in other respects, but which simply stated that the married woman was duly examined by the certifying officer, and did appear to give her consent, was *primâ facie* evidence of time, place, and the absence of the husband; these facts being held to be contained in the certificate, by the strength of the word duly.

I think we must treat the words "to the following effect," in the 2nd section of the 2nd Vic., ch. 6, as giving no greater latitude than to authorise a change of the form of expression, as for example, that "in the absence of her husband," might be used in lieu of "apart from her husband," and the like, but that we cannot construe them as authorising the omission of one or more essential particulars, and substituting a word or phrase, which might, by implication, more or less strong, be held to import that such particulars had been fulfilled. To allow such an effect to the word "duly," would be to substitute the unexpressed opinion of the party certifying of what he thought the statute required, for a certificate expressing what he had actually done.

I am of opinion we must award the *postea* to the defendant.

Postea to defendant.

WEGENAST V. ERNST ET AL.

Mill-dam—Right of party to flow of stream—Obstruction.

“W.” (the plaintiff) in an action for damages for the injury done to his mill dam, proved that “E.” (the defendant) owned a mill pond and dam about a half or three quarters of a mile from his (“W.’s”) on the same stream, and that he had his gate open some twelve or fifteen inches the night the accident happened. The defendant proved that the plaintiff’s gates were all closed, and the splash boards up at the time, and after the accident. It also appeared in evidence that there had been heavy rains for some days previous.

Held, that the opening of defendants’ gates (unless they admitted a larger quantity than would naturally flow down the stream) would not render him liable for an accident to the plaintiff’s dam; and that it was plaintiff’s duty to guard against any natural flow of the stream; and further, that unless the plaintiff let the water flow faster than it was supplied by natural causes, he was not liable for damages resulting from such flow.

The declaration set forth that plaintiff was possessed of lot No. 6, 4th concession, block A., township of Wilmot, and of a saw mill, and shingle factory, and for the working of the mill had erected a dam across the stream, which had been used to flow from a close of defendants’ higher up the stream to plaintiff’s close, and by reason of plaintiff’s possession of the said close and mill, he was entitled to the flow of the stream in its usual and natural course, flow, and current, and defendants erected and kept and continued erected across the stream higher up than plaintiff’s close, a dam and gates therein, by means whereof defendants interrupted the flow of the waters of the stream, and kept the same penned back and hindered from flowing to plaintiff’s close and mill, and by opening their floodgates caused the same to rush and flow to the plaintiff’s close with great force and violence, and in unusual quantities, by reason whereof plaintiff’s dam was washed away, and plaintiff was prevented from working his mill and shingle factory, &c.

Pleas: 1st.—Not guilty. 2nd.—That the property injured was not plaintiff’s.

The case was tried at Berlin in November, 1858, before the *Chief Justice* of Upper Canada. It appeared that the plaintiff’s dam was washed away during the night time of the last of November, or the 1st of December, 1857. It was a gravel dam. The plaintiff’s pond was not to exceed eight or ten acres. The defendants’ covered forty or fifty. The breach in plaintiff’s dam was all at one place, and was about seventy feet long. It had rained heavily the day

before, and one of the defendants had admitted that their gate had been raised about 11 o'clock on the night during which plaintiff's dam was carried away, as much as eight or ten inches; and that no notice of the raising of the gate had been sent to plaintiff, as it was not considered necessary, the gate being only raised to that extent. It was about 4 o'clock in the morning the plaintiff's dam was carried off. The distance between the two dams is from half to three quarters of a mile. Plaintiff's dam had been wide enough for a team to pass along the top of it. The water had passed over the top. It was sworn that the water in the plaintiff's dam was from twenty to twenty-four inches lower than usual the day before the breach, and the breach was occasioned by the water let down from defendants' mill. The plaintiff's gates had been kept shut all the day before, but the water was used in working his mill, and it stopt working about 4 o'clock, P. M., before the breach. It was also sworn that about 1 o'clock, A. M., and therefore about three hours before the breach, the defendants' pond seemed to be about its usual height, though the same witness, on cross-examination, corrected or changed the statement by representing that at one o'clock, A. M., the water at defendants' was higher than usual.

On the part of the defence, it was sworn that plaintiff's dam was not a strong one; that it leaked, and that the breach was from the leak towards the flume; that a witness who drove oxen over it observed that the flume leaked; that the earth gave way under the oxen, and it was hollow underneath, but the breach was not at this place, which had been repaired; that the defendants' grist mill had been running all day before the breach, and was kept running until after 12 o'clock that night; and that the water which would drive defendants' grist mill would be enough for plaintiff's saw mill; that it had rained at times for the two preceding days, and the water rose in the evening before the breach, and it rained heavily during the night; that the gate in the defendants' dam was raised from eight to ten inches at about 11 P. M.; while the grist mill was still running, it can be raised as much as three feet nine inches. The water in defendants' dam fell about one inch. He did not give notice to plaintiff

of the raising the gate, because, some weeks before, the plaintiff had told them that whenever they did not hoist more than half a gate, they need not send word to him to disturb him in the night. They had previously been in the habit of giving plaintiff notice. One of the defendants was present when the gate was hoisted, and told the witness to go and tell plaintiff, and the witness repeated what plaintiff had said, and that was the reason he did not go down. The gate remained open after the mill stopped running. At 2 o'clock, A. M., there was a full head at defendants' mill, but the water had gone down one inch. At 5 o'clock in the morning the water in defendants' dam stood as it had done at 2 o'clock. The next morning the plaintiff said his dam was gone, and in reply to a suggestion that he had not watched it, said he had too much to do to watch his dam all night. At 7 o'clock the next morning the gates in plaintiff's dam were still down, and slashboards were up, after the breach. One witness swore that about 7 or 8 o'clock in the morning after the breach the water in defendants' dam was an inch or an inch and a-half higher than it was the evening before. At 6 o'clock in the morning the gate at the defendants was closed, and had been so for an hour and a-half, but not longer. Owing to plaintiff's gates being closed and slashboards being up, as was sworn, the water before the breach could not have escaped except over the dam.

In reply the plaintiff proved that one of the defendants' witnesses had said that plaintiff's gate was raised ten cogs, each of which was an inch, but on measurement the cogs were found to be each an inch and a-half, so that ten cogs would raise the gate fifteen inches.

The jury were directed that if the plaintiff, for his own purposes, obstructed the natural flow of the water, his dam would have to bear a certain pressure, and they should be satisfied it was not an imperfection in the plaintiff's dam that caused it to give way, rather than any thing proceeding from defendants.

If no such imperfection occasioned the breach, then did defendants interfere with the flow of the stream, in its natural course, and did such interference occasion the breach in

plaintiff's dam, first, by keeping back the water, and then by letting it down without notice to plaintiff; and that being so let down, it came with unusual force, and unusual quantities, so as to increase the rush of water beyond what would have taken place *if defendant had not opened his gate?* The jury gave plaintiff a verdict, and £80 damages.

In Michaelmas Term, *Freeman*, Q. C., obtained a rule *nisi* for a new trial on the ground that the verdict was contrary to evidence. He also objected that the jury should have been told, that if the plaintiff's dam could have been saved by ordinary care, the verdict should have been for the defendants.

M. C. Cameron shewed cause. He insisted that the evidence warranted the jury in finding that the injury arose from the defendants holding back the water at first, and then letting it flow down in larger quantities than, but for the previous obstruction, it would have done. That the defendant had no right to alter the natural flow of the water to the plaintiff's prejudice; and that it was sufficiently proved he had let off the water from his own dam to escape the pressure of heavy rain which raised the water on him, and by so doing the damage was caused.

DRAPER, C. J., delivered the judgment of the court.

Upon a close examination of the evidence, I am not satisfied with the verdict. There appears to have been a heavy rain, and an increased flow of the stream would naturally result from this cause, and whether defendants opened their gate ten inches or fifteen inches, would not give the plaintiff a cause of action, because his dam was washed away by the water thereby suffered to flow down, unless a larger quantity than would, from natural causes operating at that time, have gone down the stream was let off from the defendants' pond into the plaintiff's. An increased flow of water, the result of heavy rain, might have carried away the plaintiff's dam, without some care and precaution on his part. From the evidence, it would appear that he did not use any, not watching, nor having a gate raised. On the contrary, according to some of the witnesses, all his gates

were closed, and the splash boards were up, after the breach had taken place. That there was an increased flow of water occasioned by heavy rain, seems established by the evidence on both sides. I gather also, that such an increased flow, one which would (as some evidence seems to prove it did) raise the water over so large a surface as that of the defendants' pond in a very few hours, must have been considerable, and may have been, though the defendants let no more off than the *increased* natural flow, the cause of the injury. Now, the plaintiff had to guard against any flow of water which proceeded from natural causes. In other words, so long as the defendants let down no more from their pond than natural causes brought into it, and at no faster rate than natural causes were at the time supplying it, they would not be liable. And there would be some increased quantity, perhaps quite appreciable, in the course of seven or eight hours, which would, during heavy rains, increase the water which came into plaintiff's pond beyond the quantity which escaped from the defendants'.

I think there should be a new trial on payment of costs.

CARTER ET AL. V. McLAURIN.

Debt upon Mortgage—Receipt of one shilling in satisfaction of—Ejectment.

Held, that a receipt of one shilling, in full of damages and costs, upon an action in debt, founded upon the covenant in a mortgage, did not operate as a reconveyance of the estate so as to defeat an action of ejectment brought subsequently upon the same security.

This was an action of ejectment, commenced on the 19th of July, 1858, brought to recover possession of broken lots, Nos. 22 and 23, in the eleventh concession of Caledonia, in the county of Prescott.

The plaintiffs claimed under a mortgage dated the 27th of December, 1844, for £2000, made by the defendant to William Carter, one of the plaintiffs, and William Cowan, since deceased, the father of the other plaintiffs, and whose heirs at law they are. The mortgage and heirship were proved at the trial.

For the defence a receipt was put in, which was in the following words :

“L’Original, Upper Canada, 10th May, 1848.

“Received of the defendant, Peter McLaurin, the sum of one shilling, in full payment and satisfaction of an action of debt, brought by us against him in the above court, on a covenant contained in an indenture of mortgage executed by him in our favour, dated the 27th of December, 1844, and recorded in the registry office of the counties of Prescott and Russell, the 2nd of January, 1845, for the payment of £2000, with interest, also the costs of said action.

(Signed,) “WM. COWAN.

“WM. CARTER.

“P. H. A. WM. COWAN.”

And the defendant proved by Mr. G. B. Lyon Fellowes, that the action mentioned in the receipt was commenced in May, 1848, to recover money due on the mortgage, and that the mortgagees, as subsequently stated to Mr. Fellowes, their attorney, had settled with defendant.

A verdict was taken for the plaintiff, and one shilling damages, subject to the opinion of the court, whether the receipt had the effect of re-vesting the estate in law in the defendant, so as to prevent the plaintiff’s recovery. The mortgage was not discharged in the registry books of the county.

In Michaelmas Term, the case was argued by *S. Richards*, for plaintiff, and *J. S. Macdonald*, Q. C., for defendant, citing *Doe Syburn v. Slade*, 4 T. R. 682; *Doe McLean v. Whiteside*, 5 O. S. 92; *Doe McKenny v. Johnson*, 4 U. C. Q. B. 508; *Sidey v. Hardcastle*, 11 U. C. Q. B. 162.

DRAPER, C. J.—The action is ejectment for two lots, in the township of Caledonia.

The defendant, on the 27th of December, 1844, mortgaged them in fee to secure the payment of £2000. The plaintiffs are entitled to sue on the mortgage, if it be valid and existing. In May, 1848, an action was brought against defendant to recover money due on the mortgage, and on the 10th of May, 1848, the mortgagees gave defendant the following receipt:

“Received of the defendant, Peter McLaurin, the sum of one shilling, in full payment and satisfaction of an action of

debt, brought by us against him in the above court, on a covenant contained in an indenture of mortgage, executed by him in our favour, dated the 27th of December, 1844, and recorded in the registry office in the counties of Prescott and Russell, the 2nd of January, 1845, for the payment of £2000 with interest, also the costs of the said action. L'Orignal, Upper Canada, 10th of May 1848." Signed by the mortgagees, who afterwards told their attorney they had settled with defendant. The mortgage is not discharged in the registry office.

Upon these facts we are called upon to determine whether this receipt had the effect of re-vesting the estate in law in the defendant, or rather, for it was argued that seems to be meant, whether a conveyance of the legal estate back to the defendant might not properly have been presumed.

We do not know upon these facts whether the action brought in 1848, was for interest only, or for one or more instalments, or for the whole principal. If we knew that the whole principal was not due, and could not have been sued for, then we should, without hesitation, say the receipt was not intended to acknowledge satisfaction of the mortgage debt.

But if the whole was due, we cannot assume that the mortgagees really accepted one shilling in full payment and satisfaction of £2000, nor yet, that if payment of the whole debt were actually made, the receipt would express only the payment of one shilling. The mere terms of the receipt would rather point to a discharge of the action then brought, than to a discharge even of the covenant, because that being under seal would fall under the rule, *Unumquodque eodem modo quo collegatum est dissolvitur*. The only term of the receipt indicating that all the mortgage money was due, is that it was an action of *debt*, which could not properly be brought on the covenant for any thing but the whole.

The mortgagees may have consented to discharge the action and retain the land, and it is as reasonable to suppose they did not think a release of the equity of redemption necessary, as to suppose that they imagined the receipt would re-convey the mortgaged premises. I do not think the

receipt establishes payment of the mortgage debt, and if not, there is no ground to presume a reconveyance.

Even if we could treat this receipt as a discharge of the mortgage debt, it should have been registered in order to give it the effect of a reconveyance, and I should think it an argument worthy of consideration, whether we ought to *presume* a reconveyance from a receipt for, or certificate of, the payment of the mortgage money, when the provincial statute declares that a proper certificate to that effect shall, if registered, operate as a re-conveyance.

RICHARDS, J.—In relation to the discharge of a mortgage, by provincial statute, 9 Vic., ch. 34, sec. 24, it is enacted, that the certificate of payment, or performance of condition, theretofore given *and registered*, or which might thereafter be given *and registered*, either before or after the time limited by the mortgage for payment or performance, shall be valid and effectual in law as a release of such mortgage, and as a reconveyance of the original estate of the mortgagor therein mentioned. Default had been made in the payment of the mortgage money, long before this action of ejectment was brought, and the action on the covenant, referred to in the receipt produced, and which defendant claims, operates as a discharge of the mortgage, was to recover the mortgage money. The estate of the mortgagees having become absolute, the section of the act above quoted requires that the certificate under the statute, (which certainly is not in the form of the one produced,) should be *registered* before it can operate as a reconveyance of the land. The certificate not being registered, plaintiff's title is absolute in law, and they are entitled to recover in the action. The receipt filed does not, on its face, shew the payment of the mortgage money—it is merely for one shilling, in full payment and satisfaction of the action on the covenant contained in the mortgage for the payment of £2000, with interest; and not being under seal, it does not necessarily import the payment of the mortgage money; and on the principle that the payment of a lesser sum would not discharge a greater, it could not be held to be a payment of the £2000 mentioned in the mort-

gage. It is not necessary, however, to decide this question, inasmuch as the document which is claimed to be a discharge not being registered, the defence fails.

Postea to the plaintiffs.

BOOTH V. RIDLEY.

Promissory Note—Satisfaction—Partnership.

Plaintiff holding defendant's note (not negotiable) payable on demand for £500, in transactions with one Reed (a partner of defendant) gave it to Reed, taking in return his note for £1000, for this and other transactions. In dissolving partnership, it was arranged that this £1000, or note of Reed's, should be paid by the defendant. Reed being subsequently called upon for payment obtained defendant's check for £500, and returned defendant's original note for £500 to plaintiff in payment of the note for £1000. Upon an action brought for the amount of the note of £500, the defendant pleaded satisfaction thereof by the taking of Reed's note for £1000.

Held, that the facts did not amount to a payment, and that the defendant was liable.

The first count in the declaration stated that the defendant, on, &c., by letter, promised to pay plaintiff on demand £500. Averment of demand and refusal. Common counts, for goods bargained and sold, work and materials, and money counts.

Pleas: 1st.—Payment. 2nd.—Set off. 3rd.—That after the moneys in the declaration mentioned became due from defendant to plaintiff, and before the commencement of this suit, one G. L. Reed, at defendant's request, made and delivered to plaintiff his (G. L. Reed's) negotiable promissory note, in satisfaction and discharge of the money due by defendant to plaintiff, by which note G. L. Reed promised to pay the plaintiff, or order, £1000, three months after date, for value received, and plaintiff accepted such note in full satisfaction and discharge of the moneys in the declaration mentioned. Issue.

The case was tried at Berlin, in October, 1858, before the *Chief Justice* of Upper Canada. The defendant (on whom the issues lay) called George L. Reed as a witness. He proved a letter from defendant to plaintiff as follows:

“Hamilton, 29th of June, 1857.

N. BOOTH, ESQUIRE,

DEAR SIR,—I received your check on the Bank of Upper

Canada, for five hundred pounds, currency, which amount I will hand to you on demand.

Yours most truly,

“SAMUEL C. RIDLEY.”

The witness stated that he and defendant were partners, and owed plaintiff other moneys: that he gave plaintiff his own note for £1000, and rather more, including interest, on the understanding that nothing was to be done on it, and that the £1000 would be paid by defendant, but the witness was to be responsible for the whole amount. The partnership had then ceased, and defendant assumed the whole, and was to pay the whole. The plaintiff gave up the £500 note to the witness, when he got the witness's note for £1000. The £500 note was a private transaction of defendant's, the witness took it up and held it as his own security as between him and defendant. The plaintiff came to the witness, and said he would have to sue for the £500, and for the money due him from witness and defendant; then witness gave the note for £1000, and one for £100, which satisfied plaintiff's demand against both; six months after, plaintiff came to witness complaining that witness's note was due: that defendant had paid nothing, and witness got a check from defendant for £500, and paid it to plaintiff. Defendant admitted there was still a balance of £500 due, and the witness returned to plaintiff the defendant's note for £500 now sued on, and gave him his (witness's) note for the excess that was due. The defendant's check for £500 was not given specially to pay the note, it was so much paid by defendant on account. Witness had taken up the £500 note without any understanding with defendant, who did not know at the time what witness was going to do, but witness told him of it afterwards. Defendant did not authorise the witness to return the £500 note to the plaintiff; it became witness's sole property. But he considered the plaintiff discharged the defendant from it, on getting witness's note for £1000.

The learned *Chief Justice* directed a verdict for the plaintiff, reserving leave for the defendant to move to enter a nonsuit, on the question whether the note as thus

received can be recovered by the plaintiff as transferee of G. L. Reid under the circumstances.

In Michaelmas Term, *C. S. Jarvis* obtained a rule *nisi* accordingly.

M. C. Cameron shewed cause, citing *Jones v. Broadhurst*, 9. C. B., 173, and *James v. Isaacs*, 12 C. B., 791.

DRAPER, C. J., delivered the judgment of the court.

In this case the evidence shews that Reid was no party to the note for £500, or to the consideration for it. It was defendant's private debt.

Reid's evidence appears to me to be wholly inconsistent with the idea, that he, by giving his own note for £1000 to the plaintiff, intended to extinguish the defendant's liability to pay the note for £500, or the plaintiff's right to bring an action upon it. He says he took it for his own security against the defendant, which if the defendant's liability were extinguished, it would not have been, and inasmuch as the note is payable to the plaintiff alone, and not to order or bearer, it must be sued in the plaintiff's name, or not at all. The plaintiff's right to maintain an action on this note in a court of law, could not depend upon the question whether he was suing for his own benefit or as trustee for Reid. If his right to sue on it for himself was extinguished, so would his right to sue as a trustee. The defence to the one would equally be a defence to the other.—See *Banerman v. Radimus*.

Reid did not, as alleged in the plea, give his own note and take up defendant's at defendant's request. So that unless satisfaction results from the giving of a note by the party, not in privity with the defendant, in relation to such satisfaction, the defence is not sustained. In that view, *Jones v. Broadhurst*, cited by Mr. Cameron, is an authority for the plaintiff.

Reid's note appears to have fallen due before this action was brought, for after it became due, £500 was paid by defendant's check upon it. This sum was a general payment on the note for £1000, the whole of which sum the defendant, according to Reid's statement, was to pay. Admitting that,

according to *Belshaw v. Bush* (11 C. B. 191), the giving the note by Reid, and the subsequent adoption of that act by the defendant, would have operated as a conditional payment of the note sued upon, and therefore would have barred this action so long as the condition to defend such judgment had not happened, in other words, until Reid's note was dishonoured, this action is not brought until that event has happened, and Reid's note, must upon the evidence, be assumed to be in the plaintiff's. The defence is not pleaded as it was in *Belshaw v. Bush*, and if it had been, the facts would not have sustained it.

The defendant ought not, as appears to me, to succeed on this motion for a nonsuit, unless, upon the evidence, he should have had a verdict on the plea. But I think the evidence shews there was no extinguishment of the defendant's liability, or the plaintiff's right to sue upon the note for £500, and unless there was, then no defence is made out on these pleadings and the evidence.

I think, therefore, the rule must be discharged.

Per cur.—Rule discharged.

ARNOLD V. ANDREWS,
AND
SCATCHERD V. ANDREWS.

Arrest—Surrender by Bail—Escape—Sheriff.

A prisoner on bail to the limits, having been rendered to the sheriff, and while the officer in whose custody he was placed was otherwise engaged, made his escape.

Held, that the sheriff was justified in retaking and committing him to close custody, and that when the defendant endeavoured to shew he was improperly held, he must swear positively there was no process, and not leave it to be inferentially inferred.

J. Read, in Michaelmas Term, 1858, obtained a rule calling on the plaintiff and William Glass, Esq., sheriff of the county of Middlesex, to shew cause why the bail bond to the limits in this cause, should not be delivered up to be cancelled, and an *exoneratur* entered thereon, and why the said defendant should not be altogether discharged from the custody of the said sheriff in this cause, on the ground that the defendant was surrendered to the sheriff by his bail to the limits in discharge thereof, (*Sic.*) and said surrender

was duly accepted by said sheriff, after which the said sheriff or his authorised clerk, or bailiff, or under sheriff, in that behalf, voluntarily allowed the defendant to go at large after such surrender, and has since taken the body of said defendant, and detains him in close custody in this cause, without any sufficient or proper authority so to do, and why the defendant should not be altogether discharged from the close custody of the said sheriff in this cause, until further order, on the ground that said defendant was at the time of said sheriff taking said defendant into, and detaining him in, close custody in this cause, and hitherto hath been and still is entitled to the benefit of the limits of the said gaol in this cause, and said sheriff neither had, nor has any proper authority for detaining said defendant in close custody, and why said plaintiff or said sheriff should not pay the costs of the application made in chambers, and of this application, and shew their authority for detaining in, or taking said defendant into, close custody in this cause.

There had been a summons for the same purpose obtained at chambers, which the *Chief Justice* of this court ordered to be enlarged, that the application might be made in term.

The affidavits in support of the application set forth, that the defendant was, on the 10th of March, 1857, arrested by the then sheriff of Middlesex, since deceased, by virtue of a *capias* in this cause: that defendant gave bail to the limits, and remained thereon until surrendered. That on the 6th of October, 1858, one of his bail, Andrew McKenzie and defendant went to the office of William Glass, the now sheriff, and found there John Godbold, the managing clerk of the sheriff, Richard Wigman, another clerk, and Samuel Glass, sheriff's bailiff: that A. McKenzie informed Godbold that he wished to surrender defendant, and then did surrender defendant, in discharge of his bail in this cause, and other causes in which he was on the limits: that A. McKenzie was one of defendant's bail in every suit in which he was on the limits, except a suit of Thomas Scatcherd, and McKenzie informed Godbold that he surrendered defendant, as well in all suits in which he was bail, as on behalf of Thomas Partridge, defendant's bail in the case of Scatcherd: that McKenzie had a

list of all the cases in which defendant was to be surrendered, as follows : Harris v. Andrews, Arnold v. Andrews, Johnston v. Andrews, White v. Andrews, and Scatcherd v. Andrews : that Godbold accepted defendant in discharge of his bail, and told McKenzie that was all that was required of him : that Godbold then desired defendant to go about sixty yards from the gaol to get the bail bonds from the office of Henry Hamilton, who had been acting sheriff since the death of the former sheriff until Glass was appointed : that when defendant got to the court-house gate, about thirty yards, Richard Wigmore called him back, and he returned, and then McKenzie went away : that defendant expected his brother to come to the gaol, but he did not, and defendant asked if there was any objection to his going to his brother to give him some notice to serve : that Godbold said, that as defendant had been surrendered, he doubted, but as the bonds were not cancelled, defendant might go, and suggested that Wigmore should go with him, but afterwards allowed defendant to go alone, and desired defendant to make haste back before the office closed, or come early next morning ; that defendant went, and soon after returned, having seen his brother, and found the office closed ; that on the 8th of October, about four o'clock in the afternoon, R. Wigmore came and arrested defendant ; he produced a paper which he called an escape warrant, signed by the sheriff, in a cause of White and others against defendant, being one of the suits in which defendant was surrendered, and took defendant to gaol, where he is still confined. Defendant swears that Godbold freely permitted him to go : that from the time of his going, and his subsequent arrest, he frequently met Godbold, Wigmore, and the sheriff, who said nothing to him about his not returning, and that he did not conceal himself : that his subsequent arrest and detention is wholly against his will ; that he would not have left the sheriff's office without Godbold's consent ; that he was never surrendered otherwise than by Andrew McKenzie as aforesaid ; that the sheriff now holds him on that surrender, and on the warrant, and no other way, there never having been to his knowledge any writ in the now sheriff's hands against

defendant's body, as the writs in this and the other cases were returnable long before Glass was sheriff.

It was further sworn, that on the 9th of October, 1858, Godbold, at the request of the sheriff, prepared a list, (annexed to the affidavit,) as follows: "Mr. Andrews is in custody having been rendered by his bail in the following suits, White et al. v. Andrews, Scatcherd v. Andrews, Harris v. Andrews, Johnston v. Andrews, Arnold v. Andrews." That the sheriff refused to give to the clerk of Francis Evans Cornish, attorney at law, a copy of any process or warrant by which he held defendant in custody, but said he issued the escape warrant on which defendant had been arrested himself, on his own authority; that the sheriff never had the *ca. sa.* in this cause, or the process in any of the causes mentioned in the list given by the sheriff's clerk, Godbold, in his possession.

There was also an affidavit from Andrew McKenzie, repeating the statement, that he went to the sheriff's office and surrendered the defendant; that on the following morning Godbold came to him and said, he had not given defendant up properly, as he had not got the bail bond released, and had not got a certificate of render, and that McKenzie replied he had given the defendant up, and was discharged.

Boomer shewed cause for the sheriff, and *McMichael* for the plaintiff. He filed affidavits stating, that defendant was arrested on a *ca. sa.* on the 10th of March, 1857, and was bailed to the limits; that neither the plaintiff or his attorney has discharged the defendant from custody, or released his bail; that on the 7th or 8th of October, 1858, plaintiff's attorney heard that defendant had been surrendered by his bail, but he received no notice of render, except that Andrew McKenzie, one of the bail, informed him, (plaintiff's attorney,) that he had rendered the defendant.

The sheriff made affidavit, that the defendant, about a week previous to the 6th of October last, told him he (defendant) meant to surrender, that he might, as he expressed it, take advantage of the law, and swear out in ten days; that he considers defendant was rendered by McKenzie in this and some other causes to Godbold, on the 6th of October

last, and that defendant, after such render, escaped from custody, without his privity, knowledge or consent, or that of any of his officers, and against his will; that as soon as he could, he caused defendant to be arrested as an escaped prisoner; that he continuously endeavoured to arrest him from the time of such escape until the 8th of October, when defendant was arrested; that he never saw defendant from the time of his escape until the time of his recapture; that he verily believes that before defendant came with McKenzie to render himself, he designed to effect his escape, thinking he would succeed in making it appear such escape was voluntary.

Godbold swore, that on the 8th of October, 1858, he was sheriff's managing clerk; that on that day defendant and McKenzie came to the sheriff's office to render defendant, as McKenzie said; that defendant said he must have the bail bonds, which he supposed were in the office of Henry Hamilton, lately deputy sheriff, and desired Richard Wigmore to go for them, which he did, and returned with a book containing the names of plaintiffs and defendants in all suits in which parties had been admitted to the limits; that considering defendant had been surrendered, Godbold told McKenzie he might go, and that he (Godbold,) would give him a certificate of render on the following morning; that McKenzie left, and Godbold continued examining the book, his back being turned to Andrews, for about fifteen minutes, and then he looked around and discovered that Andrews was gone, and he never saw him again until he was taken into the custody of the sheriff as an escaped debtor, on the 8th of October; that it is utterly false that Godbold permitted defendant to go out of custody after his render, to see his brother, telling him to make haste and be back before the office closed, or early next morning; that he did go to McKenzie on the following morning to endeavour to get his assistance in getting defendant back into custody, and thought that by expressing a doubt of the sufficiency of the render, that McKenzie might be induced to produce defendant; that defendant was never out of the office after the render until he escaped, and that the escape was entirely

against his will, and without his consent, acquiescence, or knowledge.

Samuel Glass, the sheriff's bailiff, expressly swore, that he was present at the render of the defendant, and assisted Godbold in the examination of the book; that the defendant did not receive any permission to retire, but left the sheriff's office unnoticed either by himself or Godbold; that he left the office in search of defendant, and searched until nine o'clock that night, and never saw him until he had been arrested by Richard Wigmore.

Wigmore also made an affidavit; he confirmed Godbold's affidavit, denying expressly that defendant received any permission to go away. He denied the statement made in the affidavit of defendant's brother, as to his (Wigmore) having told him, his brother, the defendant, was gone into the city, and swore that he went immediately in pursuit of him, but could not find him until the 8th of October, when he arrested him on a warrant from the sheriff.

DRAPER, C. J., delivered the judgment of the court.

It appears from the affidavit, that the present sheriff succeeded to office on the death of his predecessor; he was then bound to take notice of executions against parties in goal, and I presume also, those on the limits, and therefore whatever duty would have devolved on the first sheriff, devolves on his successor.

The sheriff and his officers, all admit a render, though on the defendant's affidavits, it is not sworn that the sheriff's office is at the gaol, where alone the statute authorises a render to be made.

But I think the point, as to a voluntary escape, is completely met by the affidavits in reply. And there is much in the whole complexion of the case to warrant the suggestion thrown out in behalf of the sheriff that this was a cunning scheme on the part of the defendant to relieve his bail, and at the same time to avoid being committed to close custody.

The substantial ground of this application, namely, the voluntary escape, is however answered. It was also made

a point in the rule that the sheriff has no ground for detaining defendant in custody, but I think that there is quite enough in the affidavits to shew he was a prisoner on a *ca. sa.*, and unless it was expressly sworn there was no process, we ought not to infer it, when the defendant himself sets out that he was on bail to the limits and went to render himself. If there was process requiring him to give bail to the limits to the former sheriff, we may assume that it still continues to justify the detention.

The defendant has other modes of trying the validity of his present imprisonment if he is so advised, and this alone would make us cautious before we discharged him on an application like the present.

Treating the escape as negligent merely, the sheriff has the right to retake on fresh pursuit, which is sworn to, and according to some authorities even without it.

The rule, therefore, should be discharged

THOMAS SCATCHERD V. ALFRED AUGUSTUS ANDREWS, JR.

This case is, in all material respects, like that of *Arnold v.* the same defendant. In the defendant's affidavit the same matters are set forth, and they are supported in a similar manner. While on the other side, the surrender is admitted, and the escape is sworn to have been negligent, not voluntary, and fresh and continuous pursuit until the recapture, is sworn to.

We discharge this rule on the same ground that we discharged the other.

See *Atkinson v. Jameson*, 5 T. R. 25; *Buxton v. Horne*, 1 Shower, 174; *Whiting v. Reynel*, Cro. Jac. 657; *Ridgway's case*, 3 Rep. 743; *Anderson v. Hampton*, 1 B. & A. 309; *Jones v. Pope*, 1 Saund. 35; *Filewood v. Clement*, 6 Dowl. 508; *Stonehouse v. Ewen*, 2 Str. 873; *Merry v. Chapman*, 10 A. & E. 516; *Davies v. Chapman*, 5 Bing. N. C. 453.

BULL v. KING,
AND
BOOMER v. KING.

Fi. fa. goods—Return of nulla bona by mistake—Sheriff.

Where a sheriff returned writs of *fi. fa.* goods in his office "*nulla bonâ*" under a mistake of his deputy, that a water-power held by lease was not saleable thereunder, but required a *fi. fa.* lands, the court allowed the return to be amended upon payment of the damages occasioned by the mistake, and of the costs of the application. An important reason for so doing was, that they could place the subsequent executions in as good a position as they were before the mistake occurred.

In Michaelmas Term, 1858, Boomer, on behalf of the sheriff of Lincoln, obtained a rule *nisi*, calling upon the plaintiff in this cause, and upon the several parties following: 1. Joseph P. Boomer; 2. The Niagara District Bank; 3. Thomas Rae and Richard H. Rae; 4. James Morris and Sylvester Neelan; 5. Lewis Renand and Cypican Fitzpatrick; 6. John Gladstone and Alexander Morrison; 7. Moses H. Gurnett, Robert B. Minturn, Elias Wide, Jr., and John L. Alman; 8. James Morris and Sylvester Neelan; 9. William H. Bull; 10. Richard Irvin; and 11. The Gore Bank; the respective plaintiffs in the cases in which the said W. D. King, or the said W. D. King and W. N. Hutt are defendants, upon notice of this rule, to shew cause why the sheriff of the County of Lincoln should not be allowed to amend his return to the writ of *fi. fa.*, issued in this cause, and why the said writ should not again be received by the said sheriff, and take precedence of the writs of *fi. fa.* issued in the above-named suits.

The following facts were stated on affidavit:

That about the 23rd of October, 1857, a writ of *fi. fa.* in this cause was received at the office of the sheriff of Lincoln, commanding the sheriff to make of the goods and chattels of defendants £1080 11s. 7d., which writ was returned, £300 made, and *nulla bonâ* as to residue on the 26th of April last. That the deputy sheriff, at the time of making the return, knew that a certain water power in the town of St. Catharines was the property of W. D. King, one of the defendants, but thought it could only be seized under a writ of *fi. fa.* against lands, and therefore made the said return; that this return was entirely owing to the mistake stated,

and unless the sheriff be allowed to amend his return he will be put to a serious loss.

That the sheriff, on and after the 11th January, 1858, received writs of *fi. fa.* against the goods and chattels of King and Hutt. The first received was in favour of plaintiff, the next in favour of Joseph P. Boomer, the others in the order in which they appear on the rule. That the writ in favour of Gladstone and Morrison was received on the 28th of January, 1858, and has not been returned; that the writ in favour of Morris and Neelan was received on the 20th of March, and has not been returned; that the writs in favour of the three parties last-named in the rule were received after the 28th of April, on which date all the preceding writs, except that in favour of Gladstone and Morrison, had been returned; that the writ in favour of Richard Irvin was returned *nulla bonâ* on the 12th of July, 1858; and that the remaining writs are not returned, or were not up to the 18th of October last.

This rule was opposed on behalf of the Niagara District Bank, by *M. Vankoughnet*, except on the terms that the sheriff should make the same return that he would have made if he had not fallen into the error stated by him; he filed an affidavit which went to reply to those filed against the rule by Morris and Neelan, and is hereafter noted.

It was also opposed on behalf of Morris and Neelan, by *J. Patterson*, on affidavits, shewing that on the 13th of January, 1858, a writ of *fi. fa.* at their suit was placed in the sheriff's hands, against the goods of the defendants, indorsed to levy £2506 5s., which writ, on the 15th of the same month, was returned *nulla bonâ*. That being aware of the fact that defendant King had an interest in the water power above stated, and being advised it was liable to execution, they (Morris and Neelan) placed another *fi. fa.* in the sheriff's hand on the 20th of March last. That in April or May, Morris was informed by the sheriff that all the writs prior to this had been returned, and that this writ stood first in his books; that it having been ascertained that the said water privilege remained unsold, the sheriff was instructed to levy on the same, and did so, and advertised it for sale under the writ of Morris and Neelan, but the sale

has been postponed from time to time, and the execution is not returned. That, supposing the water privilege was about to be sold on their execution, Morris and Neelan paid to Thomas R. Merritt \$375, for back rent due to him from King for the said water privilege. That if the sheriff is allowed to amend his return as prayed, they (N. & N.) will lose their debt, and the back rent so paid, as King is insolvent.

The affidavit filed by *Mr. Vankoughnet* was from Mr. Merritt, and stated that he had reasons to believe, and did believe, that Morris and Neelan had received from the sub-tenant as much money as they had paid him, and that on their re-paying the rents they have received, he is ready to repay the \$375, provided the lease is made available on the execution in this cause, and that of *Boomer v. King*.

BOOMER V. KING.

Boomer obtained a similar rule. It appeared the sheriff had received the *fi. fa.* in this cause on the 11th of January, 1858, and had returned it *nulla bonâ*, on the 27th of March, 1858. In all other respects the facts set forth were the same, and similar affidavits to oppose on behalf of the same parties, Morris and Neelan, and the Niagara District Bank were filed.

Patterson cited *Saunders v. Bridges*, 3 B. & A. 95; *Crowder v. Long*, 8 B. & C. 598; *Archbold's Prac. by Chit.* 579, 9th Ed.

DRAPER, C. J., delivered the judgment of the court.

The effect of granting these rules will be to let in Bull's *fi. fa.*, and Boomer's also, to be satisfied by the sale of the water power spoken of. And if I understood *Mr. Vankoughnet's* qualified opposition right, by enabling the sheriff to make the same returns which, if the mistake had not occurred, would have been made, the Niagara District Bank expect to preserve their priority. Morris and Neelan's writ comes next, and the substantial ground of their opposition is, that their first writ sued out and delivered to the sheriff only two or three days after those of Bull and Boomer, was also re-

turned *nulla bonâ*; that they sued out another writ, a course equally open to those who had precedence by these writs; that their second writ was the first standing to be satisfied, after the return of those of Bull, Boomer, and the Niagara District Bank, and that the water power spoken of was seized and advertised under their writ, being at the time the first writ in the sheriff's hands.

Bull and Boomer let the matter go, no doubt reserving to themselves their remedies against the sheriff, on the returns made to their writs, and content that the sheriff may succeed in this application, which will give them the same benefit that they would derive from an action against the sheriff. For all that appears, the executions of Boomer and Bull would absorb all that can be made by sale of this property.

The only argument in favour of the sheriff is, that the amendment prayed for will place Morris and Neelan in no worse situation than they would have been, if, as he ought to have done, he had levied on the property on the prior writs. That may be so, if we made it a condition that the sheriff reimbursed them \$375 rent paid to Mr. Merritt, and paid the costs of their suing out a second writ, but not otherwise.

I think the court has power to grant this application. In the case referred, in Archbold's practice, 579, cited also in Watson on Sheriffs, 72, the sheriff, under a *fi. fa.*, and a writ of *extent*, seized not only the defendant's goods, but also those of a stranger which were on the premises, and returned to both writs that he had seized goods to the amount, but that they remained in his hands for want of buyers. The sheriff was afterwards obliged, by order of the Court of Exchequer, to levy the amount of the extent upon the defendant's goods. This left him no goods of the defendant to satisfy the *fi. fa.*, and he applied to the Court of Queen's Bench for leave to amend his return to the *fi. fa.*, which that court refused, saying, that as he had seized sufficient property of the defendant, under the *fi. fa.*, he must be accountable to the plaintiff for it, and if he had, as soon as he received the order of the Court of Exchequer, stated the facts of the case to the court, *they would have relieved him from his embarrassment.* The case is cited from a

M. S. report, and no more appears. I can only suppose that the sheriff had actually seized on the *fi. fa.*, before he had seized on the extent, and that after the extent, there had been a *venditioni exponas* from the Exchequer to sell the defendant's goods, in doing which the whole were exhausted, leaving only the goods of the stranger, and that the Court of Queen's Bench, in 1817, notwithstanding the decision of the Exchequer in *R. v. Wells & Allnutt* (16 Ea. 278, note) in 1807, may have thought the plaintiff in the first execution entitled to priority, and that the sheriff should at all events have applied to that court to determine whether, notwithstanding the *fi. fa.*, he should sell under the *ven. ex.* founded on the extent.

However this may be, the court refused the sheriff's application to amend, not on the ground of want of authority, but on what they held to be the actual merits. Still, the expression, "that as he had seized sufficient property of the defendant under the *fi. fa.*, he must be accountable to the plaintiff for it," bears strongly on the present case, for it is asserted, and not denied, that he has in this instance seized property of the defendant King on the *fi. fa.* of Morris and Neelan, and has advertised the property for sale. And if we saw that the court were of opinion, that, notwithstanding the seizure on that *fi. fa.*, the extent was entitled to displace it, and to a priority of satisfaction, it would seem an authority that the sheriff was absolutely bound by his return. But I do not so understand it; I assume the court to have meant that a timely application to the Court of Exchequer would have prevented the disposition of the defendant's property to satisfy the extent, and so have left it available to the *fi. fa.*, on which it had been seized.

Still, I have great difficulty in taking from Morris and Neelan the priority they have acquired, and can only come to such a conclusion on the ground that the priority has been gained by a mere error, on the part of the sheriff, and that we can replace Morris and Neelan in as good a position as they would have been in but for that error. Even then, they will not, I apprehend, be prevented from enforcing a return to their writ, now in the sheriff's hands, and if it be

returned *nulla bonâ*, see *Towne v. Crowder*, (2 C. & P. 356,) from trying whether he is not concluded as to them, by having actually levied on their writ when he had no prior writ in hands. But inasmuch as the refusal of this application will certainly leave the sheriff liable to Bull and Boomer also, if the value of the water power exceeded the amount due to Bull, as it seems plain it arose from mistake, and as Morris and Neelan are only deprived of a priority which, but for that mistake, they would never have obtained, I think we may make the rule absolute, on the sheriff's paying the \$375 rent of the water power, paid by Morris and Neelan, or so much as they have not received from the sub-tenants, and their costs in suing out the *fi. fa.*, now in the sheriff's hands, and of this application.

Per cur.—Rule absolute.

MACDONELL V. MACDONALD.

Statute 20 Vic., ch. 22—Change of offices under.

Held, that the statute 20 Vic., ch. 22, authorises the ministers named therein holding any office of emolument under the Crown, to change their appointment more than once *within a month* without re-election.

DEBT. The first count of the declaration stated, that defendant, on the 5th of August, 1858, had before been elected and then was a member of the Legislative Assembly, and while such member, *i. e.*, on the 6th of August, 1858, was appointed postmaster-general of the province of Canada, the same then being an office at the nomination of the Crown in this province, to which an annual salary or fee, allowance, emolument or profit from the Crown was and is attached, and defendant accepted said office, by reason whereof, according to the form of the statute, &c., the seat of defendant as such member was vacated and he became disqualified from sitting or voting in the assembly. Yet defendant, after having accepted such office, and after he had so become disqualified, and without having been re-elected, did, on the 9th of August, presume to sit, and did sit as a member. Whereby defendant became liable to pay £500, and by force of the statute an action hath accrued to plaintiff, &c.

To this count defendant pleaded, that on the 27th of July, 1858, he held the office of attorney-general for U. C., and while holding such office was elected a member of the assembly, and was not in any way disqualified to be such member, and afterwards, on the 2nd of August, while he was such member and such attorney-general, he resigned the said office, and did within one month after such resignation accept the said office of postmaster-general, whereby and by reason whereof he did not vacate his seat.

Replication.—That while defendant was such attorney-general, W. C. was inspector-general, G. E. C. was attorney-general of Lower Canada, P. M. V. was president of the Executive Council (no such office named in 20 Vic., ch. 22, sec. 3 or 7), N. F. B. was speaker of the Legislative Council, L. V. S. was commissioner of crown lands, C. A. was *chief* commissioner of public works (“chief” not in statute), T. J. L. L. was secretary and *registrar* (“registrar” not in statute), and S. S. was postmaster-general: that defendant and these other persons were then also members of the Executive Council, and the public and official advisers of the Governor-General in the administration of the public affairs of this province: that on the 2nd of August, 1858, and while defendant and these other persons held such offices, and were executive councillors and advisers of the Governor-General, they resigned their offices and seats in the Executive Council, and the Governor-General duly accepted their resignations, and afterwards, on the 2nd of August, duly appointed J. S. M. to be attorney-general for Upper Canada, G. B. to be inspector-general, L. T. D. to be attorney-general for Lower Canada, L. M. to be receiver-general, J. E. T. to be president of the Executive Council, J. M. to be speaker of the Legislative Council, A. A. D. to be commissioner of crown lands, L. H. H. to be chief commissioner of public works, O. M. to be secretary and registrar, and M. H. F. to be postmaster-general, in the stead of the persons firstly above named. And the persons secondly above named were appointed to be members of the Executive Council and public and official advisers of his Excellency, in the stead of the persons firstly above named. And the persons

secondly above named accepted the said offices and seats in the Executive Council. That on the 3rd of August, 1858, the persons secondly above named resigned their offices and seats in the Executive Council, and on the 6th of August the Governor-General duly accepted their resignations, and appointed defendant to be postmaster-general, and appointed other named persons to fill up all the other named offices except those of attorney-general of Lower and of Upper Canada, and also appointed all these persons and A. T. G. and G. S. executive councillors and public and official advisers in the stead of the persons secondly above named, and they accepted the offices to which they were respectively appointed and the seats in the Executive Council, and concludes that from the facts herein set forth, and though defendant did within one month after his resignation of the office of attorney-general accept the office of postmaster-general, the seat of defendant was vacated in the Legislative Assembly, and defendant became disqualified from sitting and voting therein.

To this replication the defendant demurred; the grounds of demurrer may be briefly summed up in this, that the replication fails to shew that the defendant at the time, &c., was disqualified or declared incapable of sitting or voting in the Legislative Assembly.

The second count commences with the same statement as the first, of defendant's election and being a member of the Legislative Assembly, and avers that on the 7th of August, 1858, he was appointed to be attorney-general of Upper Canada, the same then being an office at the nomination of the Crown (as in first count with reference to the office of postmaster-general), and defendant accepted the said office, by reason whereof his election became void, his seat was vacated, and he became disqualified from sitting or voting. The same breach as in the first count, but laid on the 10th of August, whereby, &c., as in first count.

Plea.—That after defendant had accepted the office of attorney-general, he was elected a member of the Legislative Assembly, and was not in any way or manner disquali-

fied from sitting or voting in the Legislative Assembly at the time of his said election.

Replication.—That plaintiff does not proceed against defendant for having sat or voted (count is only for sitting) at any time after having been elected, subsequently to his acceptance of the office of attorney-general, but for that, defendant, after he had resigned the office of attorney-general in the plea referred to, and after he had resigned the office of postmaster-general, to which he had been subsequently appointed on the 7th of August, 1858, and in the session of parliament held in the 21st and 22nd years of her Majesty's reign, and while member of the Legislative Assembly, did again accept the office of attorney-general, by reason whereof his seat in the said assembly was vacated, and defendant became disqualified from sitting or voting. Yet defendant, after having accepted the office of attorney-general as in the second count, and this new assignment mentioned, and after he had become so disqualified, and without having been re-elected, did, on the day in the second count mentioned, sit in the said assembly, whereby, &c.

Plea to new assignment.—That before he accepted the office of attorney-general, after his resignation thereof as in the new assignment mentioned, defendant was appointed to the office of postmaster-general, and accepted the same, and while he was such member of the assembly, and such postmaster-general, he did resign the last mentioned office, and after this last resignation, but within one month from the resignation of attorney-general, was appointed to the office of attorney-general as in the new assignment mentioned, and did, after such acceptance, sit, as he lawfully might, in the said assembly.

Replication thereto.—That while defendant was attorney-general and a member of the assembly, and before he was appointed postmaster-general, the several persons firstly named in the replication to the first plea, held the several offices therein stated, adding to each of their descriptions as given in that replication, that they were members of the assembly or Legislative Council: that they were executive councillors: that on the 2nd of August, 1858, they resigned

office and their seats in the Executive Council, and their resignations were duly accepted: that on the said 2nd of August the several persons secondly named in the replication to the first plea, were appointed to the several offices therein stated (adding the fact that they then were members of the assembly or Legislative Council), in the stead of the firstly named persons, and were also appointed executive councillors in the stead of the persons firstly named, and accepted the appointments, and thereby such of them as were members of the said assembly vacated their seats therein: that on the 3rd of August the persons secondly named resigned their offices and seats in the Executive Council; and on the 6th of August, 1858, the Governor-General appointed the several persons thirdly named in the replication to the first plea to the several offices therein stated, and appointed these last named persons and A. T. G. and G. S. to be members of the Executive Council and advisers of the Governor-General: all of whom severally accepted the said offices and seats in the Executive Council: that afterwards, to wit, on the same day and year last aforesaid, the said defendant and G. E. C., J. R. and S. S. resigned their said last respective offices, and his Excellency the Governor-General then accepted the said resignations; and afterwards, to wit, on the 7th of August, his Excellency the Governor-General, for and in the name of her Majesty, appointed the defendant to be attorney-general of Upper Canada, the said G. E. C. to be attorney-general of Lower Canada, the said J. R. to be solicitor-general of Lower Canada, the said S. S. to be postmaster-general, the said A. T. G. to be inspector-general, the said G. S. to be receiver-general, and the said J. R. to be president of the Executive Council; and his Excellency, for and in the name of her Majesty, then also appointed the said J. R. to be a member of the Executive Council and one of the public and official advisers of his Excellency in the administration of the public affairs of this province: and the defendant and G. E. C., J. R., S. S., A. T. G., G. S. and J. R. did then respectively accept the said respective offices as aforesaid, and the said J. R. did then accept the seat in the Executive Council.

Averment that the several offices were, during all the times in the last replication mentioned, offices at the nomination of the Crown, to which respectively an annual salary, &c., is attached. Concluding as the replication to the first plea. The plaintiff also demurs to the plea to the new assignment. The substantial question raised by the demurrer was that the statute does not authorise the acceptance of the same office of attorney-general, which he had before held and resigned, whether the last acceptance directly followed the resignation of the same office, or another office, that of postmaster-general, had been accepted and resigned, between the resignation and subsequent acceptance of the office of attorney-general.

The defendant demurs to the replication to the plea to the new assignment, on the ground that the facts stated do not subject him to the penalty, for they do not shew that he was disqualified to sit or vote.

The third count stated, that on the 27th of July, 1858, defendant was attorney-general of Upper Canada, the same being an office at the nomination of the Crown, &c. (as in former counts), and while attorney-general was a member of the assembly, and afterwards, on the 29th of July, resigned his office of attorney-general, and afterwards, and while he was such member, on the 7th of August, 1858, was appointed to the same office of attorney-general, by reason whereof his seat became vacated, and he was disqualified from sitting or voting. It then assigns a breach of the statute by sitting on the 11th of August without re-election, and claims a penalty of £500 by reason thereof.

Plea.—That before he accepted the office of attorney-general, after his resignation thereof, and within a month after his resignation, defendant was appointed to the office of postmaster-general and accepted the same, and afterwards, and while member of the assembly and postmaster-general, resigned that office, and after that resignation, and within a month of his resignation of the office of attorney-general, was appointed to the office of attorney-general, and accepted the same, and afterwards did sit and vote in the Legislative Assembly as he lawfully might.

Replication.—That the appointment to, and acceptance

of, the office of postmaster-general were a colourable appointment and acceptance, without any intention that defendant should discharge the duties of the office, nor did he discharge the same : that such colourable appointment to, and acceptance of, that office were for the mere purpose of enabling the defendant to resign the colourable office of postmaster-general, and to resume the office of attorney-general, and so to avoid vacating his seat in the assembly, or becoming disqualified to sit or vote unless re-elected, and to defeat the statute, under pretext that the last acceptance of the office of attorney-general was the acceptance of another office than the office of attorney-general, which defendant formerly held.

The plaintiff also demurred to this plea. The objection was that the statute does not authorise defendant to accept the same office of attorney-general which he had so before resigned, whether the last acceptance directly followed the resignation of the same office, or another office, that of postmaster-general, had been accepted and resigned between the resignation and subsequent acceptance of the office of attorney-general.

The defendant demurs to the replication to the third plea, on the ground that the statute has no reference to the motives or intentions with which any office was conferred or accepted, and that on the facts stated the defendant had not vacated his seat.

The fourth count was exactly like the first, except that it charged the defendant with voting on the 12th of August, instead of sitting in the assembly on the 9th of August.

The subsequent pleadings to this count were the same as those to the first.

The fifth count was like the second, except that it charged voting on the 13th of August instead of sitting on the 10th. The subsequent pleadings to this count were the same as those to the second.

The sixth count was like the third, except that it charged voting on the 14th of August, instead of sitting on the 11th of August. The subsequent pleadings to this count were the same as those to the third.

The seventh count stated that on the 27th of July, 1858, defendant was attorney-general of Upper Canada, and the Hon. Sidney Smith was postmaster-general of the province, these offices being at the nomination of the Crown, &c., and defendant and Sidney Smith were members of the Legislative Assembly: that while such members were respectively holding these offices, they each resigned his office, and each resignation was duly accepted: that on the 2nd of August, 1858, the Hon. J. S. M. was duly appointed attorney-general of Upper Canada in the stead of defendant, and the Hon. M. H. F. was duly appointed postmaster-general in the stead of Sidney Smith, and the said J. S. M. and M. H. F. severally accepted: that on the 3rd of August the said J. S. M. and M. H. F. severally resigned, and their resignations were accepted: that on the 6th of August, 1858, defendant then being a member of the assembly, and not having been, since resigning the said office of attorney-general, receiver-general (mentioning all the offices mentioned in the first proviso to the third section, and the 7th section of 20 Vic., ch. 22), was appointed postmaster-general of Canada in the stead of M. H. F. resigned, and that defendant accepted the office: that afterwards he resigned that office, and his resignation was accepted: that on the 7th of August, defendant still claiming to be a member of the assembly, was appointed attorney-general of Upper Canada in the stead of J. S. M. who had resigned, and defendant accepted the office: that by reason of these facts the seat of defendant in the assembly was vacated, and he became disqualified from sitting or voting: yet on the 9th of August, not having been re-elected, he did vote, whereby he became liable to pay, &c., (as in first count),

Plea.—Exactly the same as the plea to the third count, to which plaintiff demurs, because the statute does not authorise the acceptance of the same office of attorney-general by defendant, which he had before then so held and resigned, whether the last acceptance directly followed the resignation of the same office, or another office, that of postmaster-general, had been accepted and resigned between the resignation and subsequent acceptance of the office of attorney-general,

and because defendant and Sidney Smith both held their respective offices at the same time, and resigned them at the same time, and others were respectively appointed to their said offices, and defendant did not hold any of the offices in the seventh count mentioned, and therefore could not, on afterwards accepting the office of postmaster-general or of attorney-general, sit or vote in the assembly without re-election, and because when the defendant resigned the office of attorney-general, he did not resign for the purpose of, or with a view to, the acceptance of any of the other offices in the seventh count.

The eighth count begins by setting out the seventh section of the statute 20 Vic., ch. 22, and proceeds to state that defendant having been attorney-general and member of the assembly, having resigned the office of attorney-general and accepted that of postmaster-general, and having resigned the last mentioned office and accepted the same office of attorney-general as in the seventh count mentioned, during all which time, until his acceptance of the last named office, he was or claimed to be a member of the assembly, he did, by reason of his last acceptance of the office of attorney-general, and notwithstanding he had so accepted the offices of postmaster-general and attorney-general within one month after his resignation of the office of attorney-general, vacate his seat in the assembly and become disqualified to sit or vote therein. For that the appointment to and acceptance of the office of postmaster-general were colourable and without any intention that defendant should discharge the duties thereof, nor did he discharge the same: that such appointment to and acceptance of such office were for the mere purpose of enabling the defendant to resign the *colourable* office of postmaster-general and to assume the office of attorney-general, and to avoid vacating his seat in the assembly, or becoming disqualified to sit or vote, &c., &c., under the pretext that the last acceptance of the office of attorney-general was the acceptance of another office than the office of attorney-general, which defendant had formerly held, when in truth it was (as it was intended to have been before defendant's appointment to and acceptance of the

office of postmaster-general) the acceptance of the same office of attorney-general which he had formerly held, by reason (*qu.* in consequence) of defendant's colourable appointment to and acceptance of the office of postmaster-general: and that defendant, after his last acceptance of attorney-general, and after he had become so disqualified, and not having been re-elected, on the 10th of August, 1858, did vote in the assembly, whereby and by force of the statute, &c.

Plea.—Same as to the seventh count. Demurrer, that the plea does not answer the substance of the count, and the charge that defendant's appointment to and acceptance of the office of postmaster-general were colourable for the wrongful purposes in the eighth count mentioned, and that the same were a mere shift by which the defendant might resume the same office which he had before resigned, and by which he might evade the necessity of a re-election.

The case was argued in Michaelmas Term by *Gwynne*, Q. C., and *Anderson*, for plaintiff, citing 11 Reports, 34; *Pierce v. Hopper*, Strange 253; *Rex v. Hodnett*, 1 Term Rep. 96; *Looker v. Halcomb*, 4 Bing. 185; Bac. Abr. Stat. sec. 5, p. 458; *Soby v. Molins*, Plowd. 468; *Becke v. Smith*, 2 M. & W. 195; *Reg. v. Frost*, 9 C. & P. 129; *Wilmost v. Rose*, 3 E. & B. 570; *Miles v. Williams*, 1 P. W. 254; *Thursby v. Plant*, 1 Saund. 240; *Salkeld v. Johnston*, 1 Hare 210; *Hall v. Franklin*, 3 M. & W. 259; *Winter v. Winter*, 5 Hare 306, contending that the literal meaning must not be adhered to when it is obviously at variance with the intention thereof, 28 sub-sec. of 20 Vic., 10, sec. 5; 7 Vic., ch. 65; 16 Vic., ch. 164; 18 Vic., ch. 86; 20 Vic., ch. 22; 1 Saunders, 131 A. & B. 3; 14 Vic., ch. 81; Bac. Abr. Office; *Egerton v. Brownlow*, 18 Jur. 71; *Magdelin Col.* 11 Rep. 74; *Doe v. Carter*, 8 Term R. 300.

J. H. Cameron, Q. C., and *Eccles*, Q. C., for defendant, referring to 7 Vic., ch. 65; 16 Vic., ch. 154; 18 Vic., ch. 86; 20 Vic., ch. 22.

Eccles contended that this statute had not been properly assented to, and was not therefore in force.

DRAPER, C. J.—There can be no doubt, under the language used in 7 Vic., ch. 65, sec. 1, that no person who was a member of the Executive Council, and who also held any of the following offices, of receiver-general, inspector-general, secretary of the province, commissioner of crown lands, attorney-general, advocate-general, solicitor-general, chairman of the board of works, register of the province, or surveyor-general, was either disqualified from being elected to the assembly or made incompetent to sit or vote. For while this section contains a long roll of offices, the possession of which disqualifies the holders from being elected or returned, and renders them incompetent to sit or vote, it expressly provides, that no part of this enactment shall extend to any member of the Executive Council, who also holds any of the offices above set forth.

And moreover, this proviso would seem to have been inserted *ex majore cautela*, for the disqualification being imposed on the holders of offices particularly named, would not, I apprehend, be extended to other offices, or at least not to those heads of departments, the inferior officers of which were specially disqualified, excepting at the same time from such disqualification certain subordinate officers in some departments, viz., the assistant secretaries, the assistant commissioner of crown lands, and the assistant inspector-general.

Neither could the penalty imposed by that act affect the members of the Executive Council holding any of the aforesaid offices, for that penalty could only be incurred by those persons or public officers described in the first section, and thereby disabled and declared to be incompetent to sit or vote in the Legislative Assembly.

That section was prospective, applying only to persons who might be elected after the passing of the act.

The 16 Victoria, ch. 154, without repeating the first section of the 7 Vic., went much further, for it enacted (sec. 2) that no person holding any office of emolument at (*qu.* by) the nomination of the Crown, should, after the dissolution of that parliament, be eligible as a member of the assembly, and that any member of the said assem-

bly who shall accept of any such office shall thereby vacate his seat, which latter provision might, in the terms used, be held to apply to the members then elected. Then follows a proviso, differing in its language from that above quoted; that nothing in the section contained shall render ineligible any person who shall be a member of the Executive Council, *or* who shall fill any of the following offices: receiver-general, inspector-general, secretary of the province, commissioner of crown lands, attorney-general, solicitor-general, commissioner of public works, president of the executive council, or postmaster-general.

By the first act, members of the Executive Council who also held any of those offices were exempted from the whole disqualification created, *i. e.*, being ineligible or incompetent to sit or vote. By this, members of the Executive Council, *or* those who held any of the enumerated offices are declared not to be rendered *ineligible*. But as all the parties referred to in the proviso (except members of the Executive Council) came within the enacting part of the section, as holding an office of emolument at the nomination of the Crown, the acceptance by a member of any *such* office would vacate his seat. At the time of the passing of that act, however, and for some years before, the office of executive counsellor was not one of emolument—there was no salary attached to it, though it was otherwise when the 7th Vic., ch. 65, was passed.

The 3rd section of the 16 Vic. introduces for the first time a particular limitation of the enactment, vacating a member's seat, on his accepting an office of emolument at the nomination of the Crown, by enacting that, whenever any person holding any one of the offices mentioned in the second section of this act, and being at the same time a member of the assembly, shall resign his office, and within one month after his resignation accept of any other of the said offices, he shall not thereby vacate his seat in the assembly, provided that nothing in this clause contained shall apply to the solicitor-general accepting the office of attorney-general.

In this section no reference is made to a person being an

executive councillor, although the second section is declared to be inapplicable to the case of an executive councillor, as well as to the holder of any other of the offices specified.

This act was repealed by the 18 Vic., ch. 84, the second and third sections of which are almost the same as the second and third sections of the act which it repeals. The second section of this later act speaks of "holding any office at the nomination of the Crown to which an annual salary, or any allowance, fees, or emoluments in lieu of an annual salary are attached," and takes effect immediately, while in the former act, the equally comprehensive, though less particular, phrase is used, "any office of emolument at the nomination of the Crown," and it is not to take effect until after the dissolution of that parliament. And as to the third section, the only difference which is not one merely of words, is, that in the former the office of president of the Executive Council is mentioned, in the latter president of committees of the Executive Council. The substantial difference between the two statutes is to be found in the first section.

Under this it may be asked, might not a person who was an executive councillor, and who also held some office of emolument at the nomination of the Crown, other than that of receiver-general, &c., be held eligible under the second section of each of those acts, though, if he gave up such office and accepted some other one of emolument, he would not come within the third section, but would vacate his seat, not, however, being ineligible, as he was still executive councillor?

We come next to the statute 20 Vic., ch. 22. The change that had, in the mean time, taken place with respect to the Legislative Council rendering for the future that body elective, but leaving the existing members unaffected, required, in the opinion of the legislature, an extension of the same safeguards to protect the independence of parliament in the persons of the elected members of the Upper House, as had been, or were, thought fitting in respect to members of the Legislative Assembly. We may, I think, safely assign that as a leading motive for the repeal of the former acts, and

the passing of this, though there are other changes which require particular attention, and which have given rise to the question now before us. After the repeal of the 7th Vic., and the 18th Vic., it follows, and renews one of the provisions of the first-named act, by disfranchising a number of functionaries and officers, judicial and other. It then (sec. 3) enacts, that, except as thereafter specially provided, no persons accepting or holding any "office, commission, or employment, permanent or temporary, at the nomination of the Crown in this Province, to which an annual salary, or any fee, allowance, or emolument, or profit of any kind, or amount whatever *from the Crown* is attached, shall be eligible as a member" of either house, "nor shall he sit or vote" in either house during the time he holds such office, occupation, or employment.

Before noticing the special exceptive proviso, it may be observed, that the language used in this section is as much more precise and particular than the corresponding section of the 18th Vic. was, in describing the offices and emolument which were to cause ineligibility, as that in its turn was more particular than the preceding statute of 16 Vic. This section speaks of every office, commission or employment, permanent or temporary, to which is attached any annual salary, or any fee, &c., of any kind, or amount whatever, no matter how insignificant, or short in duration the office, if it be accepted or held at the nomination of the Crown. And no matter how trifling the emolument from the Crown, ineligibility is the consequence. But this very minuteness in defining the cause of disqualification may possibly give rise to question, and the introduction of the words "*from the Crown*," in reference to the fee, allowance, emolument or profit attached to the office may suggest a doubt, whether, if the fee, &c., in no way proceeds from the Crown, the acceptance or holding the office will render the party ineligible. I cannot imagine for a moment that such was the intention of the legislature, or that offices in the gift of the Crown, the emolument of which proceeds exclusively from fees paid by private individuals for services rendered to them, were not meant to disqualify. It would certainly be

a strange thing, if, by force of the peculiar language used, a registrar of deeds, an officer expressly disfranchised by the first section as regards voting, should, under this third section, not be rendered ineligible; and yet, a close and critical adherence to the somewhat minute and precise language used might lead to such a conclusion. The 7th Vic., sec. 1, expressly made a registrar ineligible; but it left him his elective franchise. The latter act could hardly have been designed to reverse this, and to leave the greater while taking away the less.

Returning to the third section, the first proviso is, that nothing in this section *shall render ineligible*, any person who shall be a member of the Executive Council of this province, or who shall hold any of the following offices: receiver-general, inspector-general, secretary of the province, commissioner of crown lands, attorney-general, solicitor-general, commissioner of public works, president of committees of the Executive Council, minister of agriculture or post-master-general, or (shall) disqualify him to sit or vote in either house, provided he be elected while holding such office and (be) not otherwise disqualified.

As this proviso has a very important bearing on the question at issue, it may be well to make an observation or two upon it. It refers to two distinct matters—the rendering ineligible, and the disqualifying from sitting or voting. As to the first, the wording and sense are clear enough. No executive counsellor, and no person holding any of the offices named is incapable of, or disqualified from, being elected. The latter portion is somewhat more obscure. For we have first a general enactment, that a person accepting from, or holding under, the Crown, any office of emolument, shall not be eligible, and shall not sit or vote. Then, the first part of the proviso, excepts from ineligibility the holders of certain offices; and then follows, “or disqualify,” which must be read, “that nothing in this section shall disqualify him,” *i. e.*, the holder of any of the excepted offices, “to sit or vote in either house.” If the sentence stopped here the sense would be complete. The section does not provide for vacating the seat, and the proviso thus framed meets the whole force

of the enactment. The one renders the accepting and holding office a disqualification to be elected or to sit and vote. The other prevents either disqualification attaching to those who accept or hold certain offices. The additional words, "provided he be elected while holding *such* office, and be not otherwise disqualified, would have no significance if the sixth section of the act had not been passed, because, until then, there would have been nothing for these latter words to operate upon by way of restriction of the exception. The proviso might be held to mean, the acceptance of and holding office shall not disqualify any holder of these offices to be elected, nor to sit and vote, if he do not accept office after his election. But the sixth section was apparently designed to meet every case of acceptance of office by a *member* of either house. And it enacts, that if any such member shall, by *accepting any office*, or becoming party to any contract or agreement (*vide* sec. 4) "*be disqualified to continue to sit or vote*," his election shall thereby become void; but he may be re-elected, if eligible, under the first proviso to section three. Now, but for the the words, "provided he be elected while holding such office," a person accepting or holding any offices mentioned in the first proviso, would not be disqualified to continue to sit or vote, for, without these words, *nothing* in the preceding section extends to the holders of those offices, but reading those words in connexion with the sixth section the meaning of the whole becomes clear.

From the foregoing, the following general results may be obtained :

1st.—That no person who accepts or holds by nomination of the Crown, any office to which any emolument whatever from the Crown is attached, is capable of being elected to, or of sitting and voting in either the Legislative Council or House of Assembly.

2nd.—That this rule does not prevent any person who is a member of the Executive Council, or who holds any of the offices mentioned in the first proviso to the third section, from being elected.

3rd.—Nor does this rule prevent a member of the Execu-

tive Council, nor a holder of any such office from sitting or voting, if he were elected, while such executive councillor or office holder.

4th.—That the acceptance from the Crown of any such office as the third section describes, by a member of either house, who did not hold any office named in the proviso when elected, disqualifies him from continuing to sit and vote, and further vacates his seat.

From the fourth section of the act it also is plain.

5th.—That no contractor with her Majesty, or with any public office or department with respect to the public service of the province to be paid by public money is eligible, nor shall he sit and vote.

The fifth section enacts, that if any person thereby rendered incapable of being elected, shall, nevertheless, be elected as a member of either house, his election and return shall be null and void. And if any person declared incapable of sitting or voting shall presume to sit or vote, he shall thereby forfeit £500 currency for every day on which he shall have so sat and voted. The penalty is incurred although the seat (under sec. 5) is vacated so long as the party continues to sit or vote. It follows, therefore,

6th.—That the election and return of every person declared incapable of being elected is null and void.

7th.—That the penalty of £500 currency *per diem* is incurred by every person who sits and votes, and who is, as set forth in No. 4, disqualified from sitting or voting under the fourth section.

We now reach the seventh section, which is, “provided always, that whenever any person *holding* the office of receiver-general, inspector-general, secretary of the province, commissioner of crown lands, speaker of the Legislative Council, president of committees of the Executive Council, minister of agriculture, or postmaster-general, *and being* at the same time a member of the Legislative Assembly, or an elected member of the Legislative Council, shall resign his office, and within one month after his resignation accept any of the said offices, he shall not thereby vacate his seat in the said Assembly or Council.”

The 16 Vic., ch. 154, sec. 3, contains the first provision of this kind which is to be found on our statute book; and it is repeated in sec. 3 of 18 Vic., ch. 86. In neither of the acts containing it is there any recital or preamble explaining why such a provision was deemed necessary. Prior to the 16 Vic. it could not have been necessary, for, till then, neither the acceptance nor holding any of these offices would have rendered a person ineligible or have vacated his seat after the election. We find, then, that when the legislature first thought it necessary for the better securing the "independence of the Legislative Assembly" to enact that no person holding office of emolument at the nomination of the Crown should be eligible; and that any member of the Assembly who should accept any such office should vacate his seat, they imposed a restriction on the operation of each of these enactments: for as to the first, they provided, that neither the members of the Executive Council, nor the holders of certain high state offices of emolument, should be thereby rendered ineligible; and as to the vacating of seats, that whenever any person holding any one of these state offices, and being at the same time a member of the Assembly, should resign, and within one month after such resignation should accept any other of the said offices, he should not thereby vacate his seat. The 3rd sec. of 18 Vic., and the 7th section under consideration, are in substance and effect, and almost in words, the same as the 3rd sec. of 16 Vic. It is to be inferred from this that the legislature recognized it to be for the convenience and advantage of the public service, that members of the Executive Council, appointed according to the Union Act, "by her Majesty for the affairs of the Province of Canada," as well as the holders of particular specified departmental offices, although nominated by the Crown, and the recipients of salaries or other emoluments, should be eligible to the legislature; and that such office holders having been elected, should not vacate their seats by changing from one office to another, provided the acceptance of the new office took place within a month after the resignation of the old one. The former branch of the proposition requires no further argument or

support, the latter requires a particular examination of the language in which the assumed intention is expressed.

"*Whenever* any person," &c., in the ordinary acceptance of the words, "at whatever time any person," or "as often as," &c., for though the word "whenever" is occasionally used in the sense of, "as soon as," that sense will not be found applicable to the latter part of this enactment. If this word is properly rendered, "at whatever time," or "as often as," or reversing the order of the words of which it is compounded, "*ever* when," the doubt as to whether, by the terms of the section, more than one resignation of office, followed by acceptance of another office, may take place without vacating the seat, would seem to be greatly weakened.

We are not called upon to express an opinion on the wisdom or policy of such an enactment, nor even if we thought it would have been wiser policy to make vacating the seat the effect of every acceptance of an office of profit in the gift of the Crown, can we, on that account, assume to narrow the interpretation of the words used. I suppose the mischief intended to be remedied by these acts from the 7th Vic., onwards, was danger from the influence the Crown might obtain in the legislature, if persons appointed by the Crown to offices of emolument were eligible, or allowed to sit and vote, and more especially, if such offices were held during pleasure. The simplest remedy for the first would have been to exclude them all from being elected; for the second, to vacate the seat of every member who accepted office. The legislature have, for reasons of policy or public convenience, determined that it would not be wise to go so far: they have, therefore, left certain office-holders eligible, as, but for the disabling enactment, they would have been, and they have declared that the acceptance of office by a member of the legislature who was elected as an office-holder but resigned, shall not vacate his seat, provided the acceptance comes within a month after the resignation. May it not be said that the legislature, while applying a remedy to the mischief pointed out, were of opinion that to apply it without restriction would create another mischief? and to prevent this, they introduced the first proviso to the

third section, and also the seventh section. And if the words used in the latter are in their natural signification extensive enough to apply, *toties quoties*, there is a resignation of one office followed by the acceptance of another within a month, would it not be more an act of legislation than of interpretation to say that the most restricted sense in which the clause can be read affords the true interpretation, because the clause itself contravenes the effect of the previous enactment. "It is a very useful rule in the construction of a statute to adhere to the ordinary meaning of the words used (*Miller v. Salomons*, 7 Exch. 526-7); and to the grammatical construction, unless that is at variance with the intention of the legislature, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified so as to avoid such inconvenience, but no further." Applying this rule, and assuming the natural sense of the language to be as above supposed, it cannot be said that the larger interpretation is contrary to the intention of the legislature, because the language of the 7th section affords almost the sole guide to ascertain that intention; nor can it be said to lead to a manifest absurdity or repugnance, because it was intended to limit and restrict to some extent the generality of a preceding enactment, and to what extent we can only judge by a fair interpretation of the words used.

But other considerations have been suggested altogether *dehors* the statute to aid in its interpretation, and it has been pressed, that judicial notice should be taken of that system of administration of the Government by which the Executive Council for the time being are stated in the replication to the first and fifth pleas to be "the *public* and official advisers of his excellency the Governor-General, in the administration of the public affairs of this province." If this were a matter to consider, it would involve an enquiry respecting the maxim, the king can do no wrong, and it might be found that the individual responsibility of some minister of the Crown for each and every *act done* in his department has more to do with the matter than the advice, individual or collective, of the council. Such acts, if wrongful, have consequences, such as impeachment, trial, punish-

ment. And in these, courts and judges, according to their jurisdiction, may have to take their part.

But I do not think we can take judicial notice of what has thus been pressed upon us.

We may notice the Governor-General's commission as a public record of the highest character, and know from thence that the sovereign commands him to have an Executive Council. We find in the provincial statutes continual reference to that body. We know that by the 31st Geo. III., there was a court constituted to hear civil appeals of the Governor, &c., and of "such Executive Council as shall be appointed by her Majesty for the affairs of such province." We know there were many official acts which the Governor could only do, with the advice or consent of, or advice and consent of, or in conjunction with the Executive Council, or some members thereof. And we know that by the act uniting Upper and Lower Canada, all such powers as then existed were transferred to the Governor, and "such Executive Council, or any members thereof as may be appointed by her Majesty for the affairs of the Province of Canada. But in all the long roll of authorities cited to shew what courts have done or judges have said in ancient and modern times in construing statutes, I find in none that the courts of common law in England take notice of the "Cabinet," though it is a familiar well understood phrase in politics. The statute 7 Vic., refers to persons who are members of the Executive Council, *and* who *also* hold any of the offices of receiver-general, &c. The acts 16th, 18th and 20th Vic. adopt a different form of expression, and speak of persons who are members of the Executive Council, or who hold or fill the offices of receiver-general, &c. The first statute is plainly conjunctive, "and," "with," "also," is unequivocal. The latter acts all use the disjunctive, and while legislating on exactly the same matter, change the form of expression. The reasonable inference is, they had a motive in doing so, though I confess it is singular they should have done so, when the apparent leading object was to exclude persons holding offices of emolument at the nomination of the Crown from parliament, since, as I understood,

as a matter of fact, when the first act passed, the office of Executive Councillor was itself *eo nomine* an office of emolument, but was not so when the 16 Vic. passed, nor has been since. But none of these acts refer to what the replication contains, or give any intimation of that which it asserts.

But how could we take notice of what we are urged to do, when we consider that the political practice and arrangements referred to, must have been thoroughly understood in the legislature, and familiar to every member of each branch of it; and yet, in these statutes, and especially in the three last, we do not find a word on which, by necessary implication or by the most ingenious suggestion, the plaintiff's counsel could find an argument that the enactment was framed so as to recognize, and thereby enable the court to recognize, such political arrangement as a key to its construction. Their line of argument in asking the court to take judicial notice thereof, involves the admission that it is not to be found *in* the act, and if omitted, what conclusion ought the court to draw from the omission when called upon to give judicial interpretation? Surely, not that the legislature intended that it should be supplied by intendment or implication, or judicial recognition of extraneous matter. The legislature could have determined what would be such a change as should take a case out of the seventh section, what not; whether a leading member, or two, or three or more members of a Government resigning, perhaps leaving political life, should be, or should not be a reason to prevent the seventh section applying. Political reasons might well be assigned for one rule in preference to another, under particular circumstances, but these are not judicial reasons, and they never have as yet, at any time, been referred to, to assist in construing an act of parliament. I am far from thinking that such a state of facts as this record asserts was present to the mind of the framers of the act, or the legislature which passed it. That it was contemplated that on a given day, all the heads of the departments, being also all or nearly all executive councillors, should resign; that all these offices should be filled by a new set of men, nearly every one of whom was also made an execu-

tive councillor, who, in their turn, resign the next day after their acceptance of office, and that the greater number of those who first resigned should return to office, not to the identical offices they previously held; that they should again become executive councillors, and that some of them resigning the offices last taken, a day or two after accepting them, should be again appointed to the offices they held at the first resignation; and that all these changes should take place within about ten days. And I am still further from thinking that, with that state of facts before them, the language of the statute would be what it is. All that, however, is a matter of individual opinion as to what the legislature might or would have done. The question is, what *have* they enacted, and what is the true construction of the enactment? and in determining that, I still must be governed by the language used in this and the other acts *in pari materia*, aided by such rules as a long course of practice and authority have sanctioned.

The foregoing lengthened observations in effect dispose, so far as my opinion is concerned, of the demurrers to the replication to the pleas to the first and fourth counts. I think the defendant is entitled to judgment upon them. It appears that the defendant was, on the 27th of July, 1858, a person holding the office of attorney-general, and was then also a member of the Legislative Assembly; that on the 29th of July, while such member and such attorney-general, he resigned his office; that on the 2nd of August another person was appointed to his office, and accepted it and resigned; and that on the 6th of August, 1858, defendant accepted the office of postmaster-general. On these facts the plaintiff, on the 1st and 4th counts, asserts the defendant vacated his seat. I think this state of facts comes expressly within the words of the seventh section of 20 Vic., ch. 22, that the defendant being a member of the Legislative Assembly, and holding one of the enumerated offices, resigned that office, and within one month after such resignation accepted another of the said offices, and did not thereby vacate his seat in the said Assembly.

The second and fifth counts, with the pleadings and de-

murrers thereunder, bring up the question whether the seventh section prevents more than one resignation and one appointment to a different office, all being within one month after the first resignation, without vacating the seat. In other words, whether the defendant—being the attorney-general and a member of the assembly, on the 27th of July, resigning the office of attorney-general on the 2nd of August, (which office was immediately filled by the appointment of another person,) and on the 6th of August accepting the office of postmaster-general, resigning it on the same day, and on the next day accepting the same office of attorney-general, which he had previously resigned, all these changes taking place *within one month after the first resignation*—did thereby vacate his seat. We are not called upon to decide whether the last consideration is essential or indispensable, if the statute authorises the second change.

I have felt more difficulty in satisfying myself in regard to this question than the former. The first proviso to the third section prevents that section from operating to disqualify any holder of the particular offices from sitting or voting, provided he was elected “while holding *such* office,” and it has been strenuously argued, that taking this expression in connexion with the 7th section, the result is, that the office held when a party was elected, and that office only, may under the 7th section be resigned, and another accepted; and that it was not intended either, that a second resignation, and a second acceptance of office should take place, or at all events, that no person is permitted to return to the office he held when elected, after resigning it, and accepting another office. With regard to the last objection, I feel, on what appears to me the plain reason of the thing, much less difficulty than on the former, for in returning to the office he first held, he occupies the very position approved by his constituents when they elected him, and therefore, if there can be a second change, there appears less to be urged against his taking that office than any other, and the absence of a prohibition to this effect is entitled to some weight in considering, whether it was so contemplated and permitted. As to the first, if the legislature meant that one such change from one office to

another, but on no account more than one should be permitted, the word "*whenever*" is, at least, inappropriate. The meaning contended for by the plaintiff is, as if section 7 read thus: "Provided always, that any person holding the office of receiver-general, &c., &c., having been elected while holding such office, may resign the same, and within one month after his resignation, accept any other of the said offices, and he shall not thereby vacate his seat in the said assembly or council." If so framed, it would plainly express what, as is contended, was meant. In fact, by leaving out "*whenever*" the main difficulty would be obviated, though in that case the sentence must be re-cast. If we were at liberty to assume that a power to change *toties quoties* by a party who was elected while he held one of these offices, was a desirable, beneficial power, tending to the good of the public service, there would, I think be no difficulty in construing the section as it stands to have that meaning. I do not feel warranted in making that assumption; but I am just as little warranted in making a contrary one; so that, after all, the construction must be made on the words used, "according to their ordinary meaning, and to the grammatical construction," and so taken they are in my humble judgment so large, as not to be confined to one change only, and therefore I feel bound to hold that the legislature meant to authorise more than one change, and, as a consequence, I am of opinion the defendant should have judgment on the demurrer to the plea to the new assignment on the plea to the 2nd and 5th counts, and on the demurrer to the replication to the plea to the new assignment.

The third count states that defendant was a member of the assembly and attorney-general; that he resigned that office and was re-appointed to it, and thereby vacated his seat. The plea set up, that after the resignation of the office of attorney-general defendant was appointed to and accepted the office of postmaster-general, and that after resigning that office he was appointed attorney-general. The replication answers that the appointment to be postmaster-general was merely colourable; that it never was intended defendant should discharge, and he never did discharge the duties of

the office ; that this colourable appointment “to the *colourable office* of postmaster-general ” was merely made to enable the defendant to resume the office of attorney-general. The demurrer raises these questions whether the plea is a good answer to the count, and whether the replication a good answer to the plea.

Looking at the third count by itself, it is very questionable whether it shews that the defendant's seat was vacated. It states that the defendant was both attorney-general and a member of the assembly, which he lawfully might be ; that on the 28th July, 1858, he resigned the office of attorney-general, and that on the 7th of August next he was appointed to the same office of attorney-general, and occupied the same. Now, giving full effect to every word of this statement, does it shew that the defendant by virtue of the appointment on the 7th day of August required a new commission ? I think not ; it is not even averred that his resignation was accepted, if that would have done ; nor is it shewn that the former commission was vacated. If the defendant could discharge the duties of attorney-general after the appointment of the 7th August under the commission in force on the 29th July, I do not at present see how that appointment vacated his seat. If, however, the count be good, the plea, for reasons already given at length, is good, and contains a sufficient answer to it. It remains only to consider the replication. I take this to be meant to displace the statement in the plea that the defendant was appointed postmaster-general between his resignation and re-acceptance of the office of attorney-general. It asserts that appointment was colourable, “to the colourable office of postmaster-general,” as if the office itself was as illusory as the appointment was alleged to be ; and it is intended to sustain the count, which alleges the appointment to have been made, as next, in the order of events relative to this transaction—to his resignation of the same office of attorney-general—and this further appears from the statement that this colourable appointment was made for the mere purpose of enabling the defendant to resign it, and “to resume the office of attorney-general.” Granting, for the sake of argument, that the replication shews that

there was in truth and in fact no appointment of defendant to be postmaster-general, and so that it destroys the plea, it will not make the count good, and if that is not good the plaintiff would ultimately fail. But I do not think the replication has that effect. Notwithstanding all its averments, I think it admits an appointment, and seeks to avoid it by bringing in question the intention with which that appointment was made, and in my opinion we are not called upon by any thing in the act to enter upon such an enquiry. The legislature have declared what shall be the consequences of certain facts being established. The acceptance or holding of office are the facts which vacate seats, or render members ineligible. I cannot conceive that the enquiry as to whether a person who had accepted an office under the Crown of profit and emolument, (I do not allude to any of those offices mentioned in the 7th section,) was eligible, could turn upon the motive or intention with which he accepted it. His election would be made null and void, and his seat would be vacated by the act of acceptance, and if so, I do not see any sufficient reason for applying a different rule of construction, or giving a different effect to the act of acceptance in this case.

I think, therefore, that the defendant is entitled to judgment on the demurrer to the pleas to these counts, the 3rd and 6th, and on the demurrer to the replications to those pleas.

The only question raised upon the 7th count, and the pleadings thereunder, which has not been already disposed of, is whether a party having filled any one of the offices named in the 7th section can, by virtue of a change made under its authority, go back within a month after his resignation, without having taken another of the said offices intermediately. It was argued, that a person who held any of the offices mentioned in the first proviso to the third section, and was elected, was not by continuing to hold *such* office disqualified from sitting or voting: that such person, though permitted to resign *that* office and to accept any other within one month, was not permitted to accept the one he had once resigned: that this was the literal construction of the act, and must be strictly adhered to. It is well to remember that this literal construc-

tion is urged on the court in order to subject the defendant to a penalty of £500, or a series of such penalties, and that if a larger and more liberal construction of the act, giving at the same time full effect to every word of it, will avoid this consequence, it becomes the duty of the court, on well established principles, so to construe it. I have already adverted to the consideration, that so far as any mischief intended to be remedied was in question, there was less foundation to argue that a man's return to the office he held when elected was open to objection, than his taking any other office. As to the proper construction of the act, if it permits, as I have already expressed my opinion it does, more than one change of office, then the defendant resigning the office of postmaster-general, and accepting the office of attorney-general, did, within the letter of the act, resign his office and accept another of the said offices, and it is certainly not contrary to its spirit, that he should resume these duties which, when he was elected, his constituents knew he was bound to discharge; and if he could do this, after the acceptance and immediate resignation of another office, I see no sufficient reason to prevent our construing the act, that he may do it without taking any other office first. The actual facts apparent on the whole of this record do not make it absolutely necessary to determine this point, but I have no desire to withhold my opinion upon it.

The defendant is therefore entitled to judgment on the demurrer to the plea to this count.

The eighth count is an allegation, in substance, of the matters stated in the replication to the pleas to the third and sixth counts. The reasons given for holding those replications bad apply precisely to this count, and the plea to it which is demurred to, and therefore it is unnecessary to repeat them here. I will only add, in reference to one allegation in those replications, and this count in which the Queen's representative in this province is referred to, that if a similar action could be brought in England, I feel perfectly certain that such an introduction of the name of the Sovereign would be considered a gross violation of propriety. It appears to me that the introduction of the name of the

Governor-General here, in reference to his exercise of a prerogative function committed to him, is on the same ground to be condemned.

I am of opinion that our judgment should be in favour of the defendant on this demurer also.

It is not strictly necessary for the determination of these demurrers to say, that I do not consider the objection raised by Mr. Eccles to the constitutionality of these acts, disqualifying parties to be elected, or to sit and vote, tenable. I have referred to the 27th section of the Union Act, and am clearly of opinion the legislature of the province had full authority to pass these laws.

RICHARDS, J.—I quite concur in the conclusion arrived at by his lordship the Chief Justice, and have but little to say after his very able and lucid judgment.

The *third* and *seventh* sections of the provincial statute, 20 Vic., ch. 22, are the most important to be referred to in considering this case. I think, by transposing the language of the *third* section, it may in relation to this suit read thus:

“No person accepting or holding any office at the nomination of the Crown in this province, to which an annual salary from the Crown is attached, shall be *eligible* as a member of the Legislative Council, or of the Legislative Assembly, nor shall such person sit or vote in the Legislative Assembly, or in the Legislative Council, as an *elected member* thereof, during the time he holds such office. And nothing in this section shall render *ineligible* as aforesaid, or shall disqualify to sit or vote in either house, any person who shall be a member of the Executive Council of this province, or who shall hold either of the following offices, viz.: of receiver-general, inspector-general, secretary of the province, commissioner of crown lands, attorney-general, solicitor-general, commissioner of public works, president of committees of the Executive Council, minister of agriculture, or postmaster-general. But such person must not be otherwise disqualified, and must be elected while holding (some one of) such office (s).”

Section five imposes the penalty for sitting or voting upon persons declared incapable of so doing.

Section six vacates the seats of persons accepting office after having been elected, but permits them to be re-elected if eligible under *section three*.

I have no doubt that the defendant, on the facts disclosed in this case, would be liable under the sections of the act I have referred to, to the penalty sued for, for sitting and voting in the House of Assembly after his acceptance of office, subsequent to his resignation of the office of attorney-general on the 29th of July, unless the *seventh* section of the act has the effect of relieving him from such penalty. The plaintiff's counsel conceded on the argument, that if the defendant and his colleagues had not resigned their respective offices and seats in the Executive Council on the 29th of July, he might have resigned the office of attorney-general and accepted the office of postmaster-general, without its being necessary that he should be re-elected before he could sit and vote in the House of Assembly. But he argued that defendant could not even then have afterwards accepted another office, say that of inspector-general, without its being necessary that he should be re-elected, *section three* making it necessary that he should be elected whilst holding *such* office, (*viz.*, attorney-general,) and *section seven*, as he contended, requiring that a person should hold the office to which he was elected when resigning, and afterwards accepting another. I do not concur in this opinion, in my judgment, the words of the act do not necessarily convey that meaning, on the contrary, they seem to me fully to warrant an opposite conclusion.

The effect of *section seven* can be shewn by taking the enactment, as applying to the resignation of some one of the offices named, and the acceptance of another of them, and repeating it in reference to each. I will illustrate it as follows, by taking the first office named, and beginning by calling the section.

Section seven—Whenever any person holding the office of receiver-general shall resign his office, and within one month after his resignation shall accept the office of inspector-general, he shall not thereby vacate his seat in the said assembly or council.

Section eight—Whenever any person holding the office of inspector-general shall resign his office, and within one month after his resignation shall accept the office of receiver-general, he shall not thereby vacate his seat in the said assembly or council.

In relation to the case before us, suppose the two following sections of the statute had read thus :

Section nine—Whenever any person holding the office of attorney-general shall resign his office, and within one month after his resignation, shall accept the office of postmaster-general, he shall not thereby vacate his seat in the said assembly or council.

Section ten—Whenever any person holding the office of postmaster-general shall resign his office, and within one month after his resignation shall accept the office of attorney-general, he shall not thereby vacate his seat in the said assembly or council.

Or supposing section *seven* had read thus :

No person being an elected member of the Legislative Council, or a member of the Legislative Assembly of this province, shall vacate his seat in either of the said bodies under the following circumstances, viz. :

1st. Whenever any such person shall hold the office of attorney-general and shall resign his office, and within one month after his resignation shall accept the office of postmaster-general.

2nd. Whenever any such person shall hold the office of postmaster-general and shall resign his office, and within one month after his resignation shall accept the office of attorney-general. And so on in relation to each of the offices named in the section.

In all these cases, *then*, the holder of any one of these offices might resign the office held by him, and accept another, within a month from such resignation, without vacating his seat in either of the two Houses of Parliament, and so on, (*toties quoties*,) as often as in the judgment of the holders of these offices, and (with the consent of the Governor-General) the exigencies of the public service made it desirable that the same should be done. It seems to me the *seventh*

section is framed in the manner it appears in the statute book, to avoid the numberless repetitions of the same words that would have been necessary to express the views of the legislature by either of the modes of casting the section just referred to. I cannot doubt, however, that the meaning is precisely the same as if either of the two modes above suggested had been resorted to.

If then the meaning of the statute is that the attorney-general for the time being, after having been elected a member of the House of Assembly, may resign his office, and within one month accept another, say that of postmaster-general, without vacating his seat, why should the defendant be considered liable to the penalty of £500 for sitting or voting after accepting such last mentioned office. The plaintiff's counsel argued that when defendant accepted the second office he had resigned his seat in the Executive Council. That the word *or* in the proviso to the third section should be construed *and*, and then it would read that nothing in the section shall render ineligible any person who shall be a member of the Executive Council, (or) *and* who shall hold any of the following offices, viz., receiver-general, inspector-general, &c., including solicitor-general. That then the exchange of offices would take place by a person who was an executive councillor resigning one office, which could only be held in connexion with that of executive councillor, to take another similar office, and if he ceased at any time to be an executive councillor, he was not authorised by the statute to take the other office. The word was "*and*" in the statute of 8 Vic., ch. 65, it was changed to *or* in the amending act of 16 Vic., and there can be little doubt that the change was made deliberately and intentionally, and if so, we cannot now construe it as if it stood *and*. It is probable one, if not the sole object of the change, was for the purpose of permitting the solicitor-general, who at the time the change was made was not a member of the Executive Council, and rarely has been since, to retain his seat, and also to accept one of the other offices named without its being necessary that he should be re-elected. In truth, the *third* and *seventh* sections, in the view contended for, could not have been car-

ried out, as far as the solicitor-general is concerned, unless he were also a member of the Executive Council, which he was not, as I have already mentioned, and had not been for some time before, and has rarely been since the change of the words was made.

The argument, however, which was most strongly pressed was, that the court would judicially notice that certain constitutional usages prevailed at the time these acts were passed in relation to complete changes in the offices referred to, by one set of men, having a certain policy, going out of office, and another set of men, adopting a different policy, coming into office, and that we ought to interpret these acts of parliament in relation to these usages: that we must, therefore, assume that by section *seven* the legislature never contemplated, or intended, that *that* section should apply on the occasion of the resignation of all the holders of these offices, and the filling up of the vacancies caused thereby; the resignation of those who had been appointed to the vacant offices, and the return of the former holders of these offices, or of most of them, to the positions they had formerly held, although not with precisely the same offices, without their being called upon to go back to their constituents to permit them to express their approbation or disapprobation of such changes.

There is much force in the way this is put, and if we were at liberty to infer the intentions of the legislature, from what we ourselves would consider to be most desirable and expedient, we might possibly adopt the view pressed upon us. But we must gather the intentions of the legislature from the language used in the statute we are called upon to interpret, and if it is literally complied with, we must ask ourselves if the carrying of it out in that way involves an absurdity, or does such gross injustice or wrong that we ought to assume that the legislature did not mean what they had plainly expressed; and then we ought to do violence to its words, in order to carry out what must have been the intention and spirit of the enactment.

I can well imagine that it may have been considered a wise provision of law to vary the rule, that the acceptance of

office should vacate the seat of the person so accepting, so far as to say, that if he had been elected whilst holding an office of a similar description, the mere resigning of that office and taking the other, should not make it necessary that he should be re-elected, before he could sit or vote in parliament. I can see that such changes of office may oftentimes be of great public advantage. I can suppose a person peculiarly well qualified to discharge the duties of one of these offices, being prevented from accepting it for the time being perhaps, because another person of greater experience than himself may hold the office. The incumbent may retire from public life or may die, thus leaving the situation vacant, to which the person to whom I have referred might be appointed with great advantage to the public. But if he could not accept the office without vacating his seat, he might in consequence refuse, or in fact be unable to take the office in which his talents would be most serviceable. It might be necessary to fill up the office during the sitting of parliament, at a time when it would be exceedingly inconvenient, if not wholly impossible, with a due regard to the public interests, that a person holding an important office should be absent from his seat in parliament. I can understand that another change of offices may be again advantageously resorted to by the same persons, whenever the exigencies of the public service require it. I see nothing in the language of the statute to prevent this, and I can imagine at times great public advantages to flow from it.

It may be urged, in relation to the resumption of office by the defendant and some of his colleagues, that the legislature intended, when persons selected to fill these offices on the resignation of others, did not remain in office for a month, but resigned before that period had expired, that the previous holders of these offices might then return to and fill corresponding, but not the same offices they had filled before, without resigning their seats. I do not think this argument carries the same weight that it would if the word *other* had been left out of the statute, where it provides that if the person "shall resign his office, and within one month after his resignation, accept any *other* of the said offices, he shall not thereby vacate his seat."

But the question still remains, does the acceptance of another office within the month, prevent the necessity of a re-election in those cases where there has been a resignation at one time of all the persons holding these offices, the filling up of the vacated offices by other parties, followed by their almost immediate resignation, and the acceptance by the defendant and his colleagues of *other* offices within the month.

At the time of the passing of the act, the legislature were of course well informed as to the peculiar feature in the system of government which then and now prevails, of which it was contended we were bound to take judicial notice, and if it was not intended that the *seventh* section should extend to cases where there had been in the meantime an entire change of offices, and a filling up of vacancies, it would have been easy to have made express provision to that effect, and in the absence of such provision, I cannot say that we would be justified in presuming that they intended to make any.

In truth, however, the statute is not framed in relation to the system of government preferred to; there is no allusion in it whatever, to the carrying on of the government by and through heads of departments who should be considered as the responsible advisers of the representative of the sovereign, and as forming a provincial administration, and that they should resign in certain exigencies, or that they or any of them on being reappointed to office, after the filling of vacancies caused by their previous resignations, should be re-elected before they could sit or vote in parliament; it is framed throughout in relation to individuals, creates personal and individual disqualifications and penalties, and in no way refers to correct or unity of action between such individuals, either in relation to the positions they occupy or to each other, and in construing it we must limit its operations to its effect upon the conduct of each individual, as he may be charged with its violation.

Let us refer again then to the facts as far as the defendant is concerned, and see if he has violated the provisions of the statute. He resigned his office of attorney-general

on the 29th of July, another person was appointed to fill the vacancy occasioned by his resignation, he was on the 6th of August appointed to the office of postmaster-general, which office he accepted. If then we look only at the personal acts of the defendant, and at the *seventh* section of the statute, which I think, after all, is what we are bound to do, we find that holding one of the offices therein referred to, *attorney-general*, he resigned that office, and within one month thereafter he accepted another of the said offices, postmaster-general; *he did not*, according to that section, *vacate his seat* in the House of Assembly.

Then did he by resigning his said office of postmaster-general on the seventh day of August, and accepting the office of attorney-general, another of the said offices, within one month after his resignation, to wit, on the same day, vacate his seat. In the view I take of the statute as already stated, I think the change of office may take place "*toties quoties*," as the exigencies of the public service, or perhaps the convenience of the parties may require, without vacating the seat.

It is however suggested, and, as is contended, admitted on these pleadings, that the acceptance by the defendant of the office of postmaster-general was colourable, and for the mere purpose of enabling him to take the office of attorney-general without vacating his seat. As a general rule, I apprehend, that the motive for the acceptance of an office can not do away with the fact of acceptance. In the present case, if the defendant had not previously held office, and had been appointed postmaster-general with the intention of only holding it for a short period, for a day even, and then to resign it and be appointed to some other office, would not his seat be vacated by the act of acceptance of the office of emolument under the Crown; I think it would.

The argument was forcibly put on behalf of the plaintiff, that the acceptance of the office by the defendant being for the purpose of enabling him to take that of attorney-general, which he could not do directly, he ought not to be permitted to do that indirectly which he could not do directly. Authorities were referred to to sustain this view; one case

shewed that where by a statute an act was forbidden to be done by a corporation in relation to the disposal of its lands, they *could not* surrender land to the king to enable him to do that which it was forbidden them to do, they supposing that the king would not be bound by the ordinary provisions of an act of parliament. If this statute had in terms forbidden the party resigning his office from again accepting the same office without being re-elected, it would have shewn clearly what was the intention of the legislature in that respect. Section *three* of the statute, being the one which makes it necessary that a member accepting any office of emolument should be *re-elected*, creates the disability as a general one. Then section *seven* relieves the persons therein mentioned, when taking certain *other* offices, from the general disability before created. It does not *forbid* the person again taking office returning to the former office, and it enables him to do so through the acceptance of another office; or at all events in doing so its provisions are literally complied with. If the statute had any where *forbidden* what the literal wording of the act has enabled the defendant to do in this respect, the argument against him would have been much stronger, but it has not. The fact that this section seven does not expressly permit a person resigning an office to accept the same office within a month, does not seem to me to shew as strongly that it was thereby intended to prevent such person reaching his former office through the acceptance of another, as it shews that the section was only intended to apply to an exchange of offices between two persons holding their respective offices at the same time, so that the resignation and acceptance of both offices might be considered as contemporaneous acts, as was argued for the plaintiff. But if it be necessary to maintain that view of the section, that the resignation and acceptance of office referred to, should be contemporaneous; then that part of the section which provides, that if the office last taken be accepted *within a month* from the resignation of the other, the seat shall not be vacated, negatives that view; for if the last acceptance of office may be a month after the resignation of the former office, the resignation and acceptance will not

always be contemporaneous events. It is admitted on the record, that there was an acceptance in fact by the defendant of the office of postmaster-general, although it is alleged to be colourable; but if he in fact accepted the office, he is within the words of the section, and could then resign that office and accept the former one of attorney-general within the month.

On the whole then, from the best consideration I can give the subject, I think the judgment of the court must be for the defendant. In arriving at this conclusion, I am by no means prepared to say that the questions raised and decided are entirely free from doubt. But in reference to the case, I cannot overlook the fact, that the action is for *a penalty*, and when a defendant has literally complied with the terms of an act of parliament, we ought to see our way very clear, that the legislature meant something different from what was actually expressed, before we can make the defendant constructively liable to heavy penalties.

Per cur.—Judgment for defendant.

HILARY TERM, 22 VICTORIA.

Present :

THE HON. WILLIAM HENRY DRAPER, C. B., C. J.

“ WILLIAM BUELL RICHARDS, J.

(HAGARTY, J., being absent in Europe.)

PARKER V. THE MUNICIPALITIES OF THE UNITED TOWNSHIPS
OF PITTSBURGH AND HOWE ISLAND.

By-law—What is notice of passing—Opportunity of opposing.

A by-law having been passed without the proper number (six) of notices being posted up, but proof of some having been posted being given, and one or more of them having come to the notice of the applicant, *Held* sufficient.

The applicant being aware of the day of passing the by-law, and having given notice that he intended opposing the same, took no further steps in opposition until making the application to the court to quash it. *Held*, not sufficient.

In Trinity Term last, *Philpotts* obtained a rule *nisi*, calling on the defendants to shew cause why a by-law passed the 28th of November, 1857, entitled “a by-law to close the road crossing lot Nos. five and six, in the 4th concession of Pittsburgh, upon the petition of John Ferguson and others, dated the 21st of June, 1857,” should not be quashed, on the grounds that the same was passed without due or sufficient notice being given of the passing the same, under the statutes in such case made, and because the said relator had no opportunity of opposing the same, and because he was wrongfully deprived of such opportunity, and on grounds disclosed in affidavits and papers filed, and because the by-law is uncertain and indefinite, in not stating in the preamble any object of passing the same, and in not shewing and defining at what point the road therein mentioned was to be stopped or closed.

The by-law recited it was expedient and necessary to stop the road crossing lot Nos. five and six, in the 4th concession of the township of Pittsburgh, not being an original allowance for road; and it enacted that the road be closed, as not

being useful to the public. The affidavit of the relator stated that he was seised, in fee simple, of the east half of lot No. six, in the 4th concession of Pittsburgh; that there is a road called the Old Perth road, which crosses his land in the north part, and a new road called the Kingston and Phillipsville macadamized road, which crosses his land on the south part; that between these roads, and parallel to them there is a steep ridge of granite rock, thirty or forty feet high, which crosses the land, dividing it into two parts, each totally separated from the other, which ridge cannot be crossed by any vehicle; that the old Perth road has been a public highway for thirty-five years, and was the only mode of access to the north and most valuable part of his land; that he is greatly injured by stopping it; that he was informed of the intention of the municipal council to stop this road a month before the by-law was passed, and that notices to that effect had been posted up near the premises; that he made diligent search but could not find any such notice, and is informed that by neglect of the township clerk no such notice was put up; that he attended one meeting of the township council, with witnesses, prepared to oppose the passing such a by-law, but was informed by the reeve they would not act in the matter on that day, and would give him notice before passing such a by-law; but either on that or some other day in that week, they passed it without further notice to him; that in April, 1858, the old Perth road was blocked up, so that he is deprived of access to the north part of his farm with wheeled vehicles; that he never received any notice from the reeve or any other person, that any such by-law was intended to be passed, and had no other knowledge of it till it was passed; that he asked the township clerk where he had put up notices, and was told that the township clerk had not put them up himself, but had sent out three notices by another person, with instructions to put them up.

In Michaelmas Term *H. Smith*, Q. C., shewed cause. He excepted to the style and title of the rule and affidavit on which it had been moved, as being against the "municipality of the united townships of Pittsburgh and Howe Island,"

whereas there is no such union of townships. By 8 Vic., ch. 7, schedule B., it is provided what townships shall constitute the county of Frontenac, and among them is "Pittsburgh, which shall include Howe Island." The 12th Vic., ch. 78, made no change. But the 14th & 15th Vic., ch. 5, sec. 14, and schedule D., erected Howe Island into a separate township.

He filed affidavits shewing that Parker, the relator, did not own or occupy the *east*, but the *west* half of lot No. six, 4th concession of Pittsburgh, and denying the inconvenience stated by Parker, to arise from closing the old road, and representing such closing and the opening of the new macadamized road, as a great advantage and public convenience; that cord-wood has been, and can be hauled from the north to the south part of Bennett's farm, and that trifling expense would make the communication good. One party swears he put up two notices of the intention to pass the by-law in the neighbourhood, and is aware that other similar notices were put up.

The township reeve and clerk both swore, that Howe Island is a part of ward No. 5, in the township of Pittsburgh, which township alone forms the municipality. The reeve further stated, that on the 14th of November, 1857, Parker spoke to him on the subject of this by-law being passed, and that he informed Parker the matter would be taken up in council on that day fortnight; that on the 28th of November the by-law was passed; that on the 14th of November, Parker told the reeve he would send a surveyor with a map to oppose the by-law on the 28th of November, and Parker also told him he had seen a notice of the intention of the council to pass the by-law. A sworn copy of the minutes of the council was annexed to the reeve's affidavit, shewing that on the 14th of November they received notice from Bennett Parker, that he would object to the closing of the old road across lots Nos. five and six, in the 4th concession of Pittsburgh, *dated the 12th of November, 1857*, and that such by-law was passed on the 28th of November.

Smith cited *Lafferty v. Municipal Council of Wentworth*, 8 U. C. Q. B. 232; *Fisher v. Municipality of Vaughan*, 10

U. C. Q. B. 492 ; and Bryant v. Municipality of Pittsburgh, 13 U. C. Q. B. 347.

DRAPER, C. J., delivered the judgment of the court.

The application was rested on two grounds. 1st.—Want of notice. 2nd.—That the applicant had no opportunity of being heard, which he claimed.

As to the first, the case of Lafferty v. The Municipal Council of Wentworth, is very like the present. The applicant does not positively negative any notices having been put up, and the municipality do not prove that six were put up. But they prove positively that some were put up, and others, it is believed were, while it is sworn that the applicant stated he had seen one of the notices, and it appears that he attended on the 14th of November, before the by-law was introduced, and had express notice from the reeve to attend on the 28th of November, when the by-law would be brought up, and that he gave notice of his intended opposition, and stated he should send a surveyor with a map to oppose its passing. We are clearly warranted by the case referred to, in saying that, under these circumstances, we could not quash the by-law for want of notice.

The second objection equally fails, for the default was that of the applicant, who neither appeared on the 28th day of November, as he was told, and stated he meant to do, either in person or by some one to represent him. Nor does it appear that he made any further enquiry, or attempted to be heard, or took any other step until he resolved on this application.

Per cur.—Rule discharged with costs.

BRUYERE V. KNOX.

Ejectment—Sheriff's sale—Registration—Priority of.

Held, that a purchaser for value *with a registered title*, under a sheriff's sale of "A.'s" interest in land, was entitled under the registry laws to prevail against a non-registered conveyance made by "A." prior to such sale by the sheriff.

EJECTMENT for lot No. 2, in the second concession of the township of Sidney, Hastings ; writ issued 1st of September, 1857.

The trial took place before *Draper*, C. J., in March, 1858. Both parties claimed under a sale made by the sheriff of the County of Hastings under a *fi. fa.* against the lands of Robert Lester Morrough. *Adam Henry Meyers* (the attorney for the plaintiff in the execution) attended on his behalf and as his agent at the sale, and the land was there bid in for the plaintiff, but Meyers took a deed from the sheriff, dated the 27th of April, 1848, to himself in fee. The *fi. fa.* was recited in the deed, as commanding the sheriff to levy £603 11s., and it was also recited that Meyers was the highest bidder at the sum of £200. The plaintiff in the execution, who is also the plaintiff in this action, finding this out, applied to Meyers, who thereupon said it was a mistake, and drew a deed in his own handwriting from the sheriff to the plaintiff, also writing a letter to the sheriff, who then executed the second deed of the same land to the plaintiff, reciting the execution, &c., as in the first deed, but treating the plaintiff as the purchaser as well as the execution creditor. This second deed bore date the 23rd of August, 1848, and was registered before the sheriff's deed to Meyers was registered, 23rd of August, 1848.

It was admitted that Morrough's title was a registered title.

The defendant claimed under a deed from Adam Henry Meyers, dated the 6th of September, 1849, for an expressed consideration of £350, which had never been registered. The deed from the sheriff to Meyers, dated 27th of April, 1848, was registered on the 7th of March, 1857.

On this evidence the learned judge directed a verdict for the plaintiff, subject to the opinion of the court; the plaintiff contending that the deed to him, by the direction and with the knowledge of Meyers, operated as an estoppel upon Meyers and the defendant, who claimed herein that the title being a registered title, and that plaintiff being a purchaser for value (because his taking the deed operated as a satisfaction for £200 of his execution), and having registered his deed before the registration of that to Meyers, this deed became fraudulent and void as against the plaintiff, and especially as Meyers paid the sheriff nothing for all that appears.

For the defendant it was insisted that the sheriff, having executed one deed by virtue of the *fi. fa.* and the sale made thereunder, had exhausted the power, and had no authority whatever to make the second deed to the plaintiff. It was also urged that it did not appear the land had been granted by the Crown, and therefore the Registry Act would not apply.

The case was argued in Michaelmas Term last. *Bell* (of Belleville), for the plaintiff, cited *Doe Brennan v. O'Neill*, 4 U. C. Q. B. 8.; *Thomas v. Cook*, 2 B. & A. 119; *Walker v. Richardson*, 2 M. & W. 882; *Stone v. Whiting*, 2 Stark. N. P. C. 236.

Wallbridge, Q. C., for defendant.

DRAPER, C. J., delivered the judgment of the court.

The cases of *Thomas v. Cook*, *Walker v. Richardson*, and *Stone v. Whiting*, have no bearing on the present question. They relate to the surrender of terms by the operation of law.

Doe Brennan v. O'Neill is more to the purpose. It decided that where the title to land is a registered title, and the owner makes a deed to a purchaser, which deed is not registered, and afterwards upon a *fi. fa.* against the lands of the former owner the sheriff sells and conveys the same lands to a purchaser for value, who gets the deed from the sheriff registered, the first deed is fraudulent and void under the registry laws as against the purchaser at the sheriff's sale.

That case is a direct authority in the plaintiff's favour, unless the fact that both the deeds were made by the sheriff instead of the first unregistered deed being made by the original owner, against whom the judgment was recovered, makes any difference.

When the owner in fee simple conveys his lands in fee to a purchaser for valuable consideration, he ceases to have any right, interest or estate whatever; and consequently at the common law any attempt on his part to make a subsequent sale or other disposition of them would be nugatory and void. Nevertheless the registry acts do enable that owner to make a second conveyance for valuable consideration to another purchaser; and if such second conveyance obtains priority of registration, as against those claiming under it,

the first conveyance becomes fraudulent and void. The object of the registry law is to protect subsequent purchasers, making them safe in purchasing from him who is shewn to be owner by the registry books; and it has made this change, that at common law deeds take effect from the date of their execution, while under the registry law they have priority only according to the order of their registration.

The law imposes on the sheriff an express duty to sell, directing the observation of certain preliminaries; but the necessity of a conveyance arises, not from the law authorising the sale, but from the general law regulating the transmission of real estate. If the sale be effectually made, the conveyance may, according to *Doe v. Miller* (10 U. C. Q. B. 65), be executed at any time afterwards. This present case may be looked at in two aspects, 1st, treating the conveyance to Meyers as made in pursuance of the sale, or, 2nd, treating it as made by mistake, or by the fraud of the grantee, to a party not entitled to it under the sale.

There is much difficulty at first sight in arguing that after a sheriff has in due form made a sale of lands, awarding them to the highest bidder, and then has executed a conveyance to the highest bidder, he can again expose the same lands to sale, and convey them to a subsequent purchaser. Unless the registry law intervenes, the second sale can pass nothing, nor have any operation on the estate. But the same proposition would be undoubtedly true, if (*mutatis mutandis*) it were enunciated respecting the original proprietor of the lands; and yet under the registry law the second purchaser, being first in the order of registry, would prevail. Why? Not because any estate, any *scintilla juris* remained in the vendor after the first conveyance, for as regards him the second sale is fraudulent and wrongful; but because, under the circumstances, the registry law avoids the first deed, not in favour of the vendor, but as against the subsequent purchaser for value. That reason would appear equally applicable to a sheriff's deed. The consequence is attached to the neglect and omission of the first purchaser. The second purchaser from the original proprietor searches into the title of his vendor; he finds all right, and duly

registered. He is (at law at least) under no obligation to enquire further. The second purchaser from the sheriff makes the same search into the execution debtor's title. Satisfied with that if he also ascertains that there is a judgment and a writ giving power to the sheriff to sell the debtor's estate. What need is there on his part for further enquiry? I confess I cannot satisfactorily distinguish it in principle from *Doe v. Brennan*. Suppose a sheriff to have sold lands regularly under a *fi. fa.*; to have executed a deed to the purchaser; to have returned the writ, and to have paid over the proceeds to the execution creditor, and satisfaction to be entered; and that after all this, the execution debtor sells the land to a third party for valuable consideration, who gains priority of registration over the sheriff's vendee, would he not prevail under the registry law? He has searched at the registry office; has found a registered title ending in his vendor; has found that there have been judgments, and that they are satisfied. What more could he look for? I should think as against him the sheriff's deed, through the neglect and omission of the sheriff's vendee, would be held fraudulent and void. But this conclusion is predicated on the assumption that the sheriff has gone through the formality of a sale, at which the second purchaser was the highest bidder, and having paid his money has obtained his deed and gained priority of registry; and if we assume that the sheriff had awarded the land to another party at a previous sale, and had executed a deed to him, and incautiously parted with it without being paid, a second sale might possibly be upheld as being within the power of the sheriff, though it is not necessary now to determine that question.

In this case, however, there has been but one sale, and upon the facts as admitted we are warranted in treating that, as a sale to the plaintiff, for Meyers, though the bidder, paid nothing, and was acting as agent for the plaintiff; no money, in fact, passed into the sheriff's hands at all. I see no suggestion of any payment, except that the amount of the bid must have been credited as money received by the plaintiff on the execution, and therefore his demand *pro*

tanto was satisfied. There was no other person except the plaintiff who was entitled to the conveyance; and it is admitted that the sheriff executed the second deed, because, as Meyers informed him, the first was made in mistake. But if so, the sheriff had not executed the power the law gave him, which was to convey the debtor's land to the purchaser at the sale; and to execute a deed to another party not the purchaser, and without the purchaser's authority, if done by mistake, and *a fortiori* if done through fraud, cannot, I think, be held to be an execution of the power, or to justify our treating the sheriff as *functus officio*. If the defendant, being a purchaser for valuable consideration, had obtained priority of registration of the deed to Meyers, the case would have required a very different consideration; but as it is, we are acting in conformity with the spirit of the Registry Act, and in accordance with the justice of the case, in determining that the plaintiff is entitled to the *postea*.

Per Cur.—*Postea* to plaintiff.

See *Doe v. Douston*, 1 B. & A. 230; *Doe v. Jones*, 9 M. & W. 372; *Doe v. Tiffany*, 5 U. C. Q. B. 79.

WILSON V. WILSON.

Dower—Seisin—Voluntary deed fraudulent as against subsequent one for value.

A. conveys without consideration to N. W. a lot of land, who takes it and remains in possession some years and leaves. A. subsequently conveys to T. W. for value the same land.

Upon a plea of *ne unques scisie que dower*, in an action for dower by the widow of N. W. against T. W., *Held*, that the first deed being without consideration, was fraudulent as against the second, and that the claim for dower rested upon the seisin under it was not sustainable.

DOWER in the south-half of No. 97, in the township of Stamford. Plea: *Ne unques seisie que dower*.

The trial took place in October, 1858, at Merritsville, before *Draper*, C. J., C. P. It was proved that Thomas Wilson, the father of the demandant's husband Nathaniel, and of the tenant, claimed to own this land, and both parties claim under titles derived from him. Nathaniel died in February, 1857. He was in possession of it, after his marriage to demandant about 1822 or 1823, and built a house and barn upon it, and lived there ten or twelve years, and

and then left, and never occupied it afterwards. A great deal of evidence was given to shew that Thomas, the father, had conveyed the premises to Nathaniel as a gift. It was disputed whether the deed was ever delivered, but there was evidence to shew that it was in Nathaniel's possession while he occupied the premises. It was proved that Thomas the father, in 1839, conveyed the premises to the tenant, for a valuable consideration, as was sworn, of about \$1800, and that Nathaniel witnessed this deed and proved the memorial thereof for registry. After this Nathaniel executed a quit claim deed of the premises to the tenant. The jury found that Thomas Wilson, the father, was in possession of this land, claiming it as his own, and that he conveyed it by way of gift to his son Nathaniel, and that he afterwards conveyed the same land to the tenant for valuable consideration; that the tenant, when he got the conveyance from his father, had notice of the prior deed of gift; and that Nathaniel was a subscribing witness to the deed from his father to the tenant. They found for the demandant, subject to the opinion of the court.

The case was argued in Michaelmas Term last, by *M. Vankoughnet* for the demandant, and *M. C. Cameron* for the defendant. *Vankoughnet* cited *Twyne's case*, 1 Smith, L. C. 1.

Cameron, contra, referred to an American case in 1 Humph.

DRAPER, C. J., delivered the judgment of the court.

There is no necessity for going behind the elaborate judgment of Lord *Ellenborough*, in *Doe Otley v. Manning*, (9 Ea. 59), and the subsequent case of *Buckle v. Mitchell*, (18 Ves. 100), in which Sir *William Grant* stated it to be the rule in equity as well as at law, that notice of the contents of the voluntary settlement to the purchaser for valuable consideration, would not affect the question. The authority of those cases cannot be shaken, unless by the legislature.

The finding that the first deed was merely a deed of gift, was the only conclusion warranted by the evidence. It was not pretended at the trial, that the marriage of the demandant with Nathaniel Wilson was the cause or consideration of

his father conveying to him. This deed, therefore, was clearly voluntary. The jury also found that the second deed was for valuable consideration, of which there was sufficient evidence. Then, according to the authorities, the deed to Nathaniel became fraudulent and void, and as a consequence the demandant, whose claim is founded upon his seisin, which rested entirely upon the deed, must fail.

The *postea* must be delivered to the defendant.

BABCOCK V. THE MUNICIPAL COUNCIL OF THE TOWNSHIP OF BEDFORD, &c.

Jurat—Insufficient designation of commissioner—By-law.

Held, that a signature in the jurat of an affidavit, without the addition of "A commissioner, &c.," was insufficient.

Held also, that an applicant against a by-law should state that he is a resident in the township, or has an interest in the provisions of the by-law. The commencement of an affidavit: "I, J. B., of the township of B.," not being sufficient.

In Trinity Term *Phillpotts* obtained a rule *nisi*, calling on the Municipal Council of these united townships to shew cause why a by-law, entitled "By-law No. 34," passed by the said council on the 19th June, 1858, should not be quashed, on the grounds that no notice, or no sufficient notice was given of the passing of the same under the statute, and because the same was improperly passed, not according to the provisions of the statutes, that the title and the preamble are insufficient "in not stating that the road therein stated" may be closed, and because the by-law is unrestrained and indefinite in describing *either* of the roads therein mentioned, and not shewing where or in what part the road running through lot No. 4 is to be stopped, and on grounds disclosed in affidavits.

The by-law passed on the 19th June, 1858, recited that it was expedient and necessary to establish a certain public highway in the township of Bedford, and it enacted that the public highway commencing at the boundary line between the said township of Bedford and the township of Hinchinbrook in the 1st concession of Bedford, and running thence to the second (*quæ*. concession) of Bedford, between lots

Nos. 5 and 6 in the said first concession, be made an established road, which said road shall, and is hereby declared to be in lieu of the present road running through lot No. 4, in the said first concession, and that the said road through lot No. 4, in the said first concession of the said township of Bedford, be shut up, and be no longer a public highway.

The affidavit of the applicant stated that no notice whatever that such by-law would be passed was put up in the said township, or elsewhere. That a notice as follows: "Notice is hereby given that the Municipal Council of Bedford, Oso, Olden and Palmerston, has passed a by-law closing up the road running through lot No. 4, in the 1st concession of the township of Bedford, and opening in lieu thereof the side road between lots Nos. 5 and 6, in the said concession of the said township, from the boundary line between Hinchinbrook and Bedford, to the 2nd concession line of Bedford. Upon an order in Council, dated 3rd April, 1858. John N. Bennett, township clerk. Township Bedford, April 6th, 1858" was advertised in the "British Whig" newspaper, published in the city of Kingston, on the 8th April last, and copies thereof were posted in two places near the said old road, upon lot No. 4, one of them fixed to a tree in the woods, and the other to a stump on the boundary line between Bedford and Hinchinbrook. That he does not think any other notices of this by-law were put up, and believes the notice was published to deceive the Court of Quarter Sessions into the belief that such by-law was passed and in force for the purposes of avoiding the consequences of an indictment for obstructing the said road, on which one George Howes had been convicted, and was to be called up for judgment in June. That the road between lots Nos. 5 and 6 is not a new road, but was in use long before the passing of the by-law: it is an allowance for road between those lots: it is a bad road, nearly impassable for wheeled vehicles, and is a very inadequate substitute for the said road on lot No. 4, which is a good road fit for use.

In Michaelmas Term *Kirkpatrick*, Q. C., shewed cause. He objected, 1st, that it did not appear that the applicant had any interest in the matter; he was merely described in

the affidavit as "James Babcock, of the township of Bedford, in the united counties of, &c., farmer." All this might be true, and yet he might have no interest in the question, or in any question of the kind, in the township of Bedford. His interest should be shewn as a fact in the affidavit. Then the jurat of the affidavit was improperly signed, it purported to be sworn before George L. Mowat, not adding a commissioner, &c.

Subject to these exceptions, he went into the merits. He filed the affidavit of the township clerk, stating that he prepared the notice published in the "British Whig," and that he put up copies thereof in six public places, near the road intended to be stopped, specifying the places. That the by-law was not then passed, nor for more than a calendar month afterwards. That the change mentioned in this notice had been petitioned for by the freeholders, &c., and the prayer had been granted by the Municipal Council, and he (the clerk) was directed to give the proper notices. That this was the first of the kind he had ever drawn up, and that he copied it from a newspaper, conceiving it applicable as a notice of by-law, under 12 Vic., ch. 81, sec. 192, in which light and meaning he believed it was invariably regarded by parties in the township of Bedford.

He filed other affidavits, shewing that the notice was put up in six different places, and was published in the "British Whig." But they all referred to the notices mentioned in the affidavit of the township clerk, that a by-law "has been passed." No answer was given to the allegation that George Howes was convicted of nuisance, though George Howes and his son are two of the deponents, the father being the owner of lot number four, through which the old road runs.

DRAPER, C. J., delivered the Judgment of the court.

I think the preliminary objection to the jurat of the affidavit, which is "sworn at the city of Kingston, the 25th day of August, 1858, before me, George L. Mowat," adding no designation whatever to shew in what character he professes to act, is fatal. No cases can, I believe, be found, in which such a jurat has been held sufficient. *Howard v.*

Brown (4 Bing. 393), is an express authority against it. In *Henderson v. Harper* (2 U. C. Q. B. 97), and in *Brown v. Parr* (ib. 98), *Jones, J.*, held that the words "a commissioner, &c." were sufficient; and in *Murphy v. Boulton* (3 U. C. Q. B. 177), *McLean, J.*, held the same, where the words were "a commissioner in B. R." But *Jones, J.*, said: "The person before whom the affidavit is sworn is known to this court as a commissioner for taking affidavits," and *McLean, J.*, approves this doctrine, though expressly contrary to *Frost v. Heyward* (10 M. & W. 673). But, with great deference to these opinions, they were not called for by the cases in which they were expressed, for in each, the words, "a commissioner," or "comm'n," were added, and this has been held sufficient in repeated cases, and *Murphy v. Boulton* has been acted on as an authority that the addition "a comm'n," is enough; in *Pawson v. Hall* (1 Prac. R. U. C. 294), and *Brett v. Smith* (ib. 309). The same question as that now before us, was before me, sitting, if I remember rightly, in the Practice Court, and upon clear English authorities I held the affidavit insufficient, and the same authorities lead me to the same conclusion now. I do not like to turn parties round on merely formal objections; but there must be some rule to which commissioners are to be held, and I think the indulgence shewn to want of attention or taking a little trouble in exercising these functions, has gone far enough. It would perhaps have been better that in every case the commissioner should have added not only that he was such a commissioner, but that his authority existed at the place where he exercised it. That however, has been held unnecessary, but it should, in my opinion at least, appear that he professes to act, and declares that he is acting, as a commissioner of the court.

It appears to me also, that in strictness the applicant should state that he is a resident of the township in which the by-law is passed, or has an interest in the provisions of the by-law. I do not think the mere fact that the affidavit commences, "I, James Babcock, of the township of Bedford, farmer," is such statement on oath that he is a resident of the township as would satisfy the language of the 194th sec. of 22 Vic., ch. 99, for that leaves no room for question that

the fact that the applicant is a resident must be distinctly set forth, and such, I have no doubt, was equally intended, though not so unequivocally expressed, by the 155th sec. of 12 Vic., ch. 81. There are many cases in England in which under the rules of court proceedings have been held irregular for not stating where the deponent, who made an affidavit, resided; and our 109th rule requires the addition and true place of abode of every person making an affidavit to be inserted therein, so that a compliance with this rule may be held to amount to a statement that the deponent is a resident of the place of which he describes himself to be, though of course it may be contradicted by the opposite party.

I am very reluctant to give way to the formal objection as to the affidavit appearing to be taken before a commissioner, because I do not think proper notice was given, as required by law, prior to the passing of the by-law. It seems to me absurd to contend that notice that a by-law has passed, can be deemed notice of an intention to pass one, and therefore, as at present advised, I should be in favour of the application. As it is, however, it appears to me it must be discharged.

As to the jurat, see *Burdekin v. Potter*, 9 M. & W. 13; *Hopkins v. Pledger*, 7 Jur. 941, 1 D. & L. 119; *Frost v. Heywood*, 10 M. & W. 673; *Fairbrass v. Pettit*, 12 M. & W. 453; *Munden v. Duke of Brunswick*, 4 C. B. 321; overrules *Hill v. Royston*, 7 Jur. 930; *Bell v. Port of London Assurance Co.*, 1 L. M. & P. 691; *Howard v. Brown*, 4 Bing. 393.

As to residence, see *Jarrett v. Dillon*, 1 East. 18; *D'Argent v. Vivian*, ib. 330; *Vaissier v. Alderson*, 3 M. & S. 165; *Polleir v. DeSouza*, 4 Taunt. 154; *Sedley v. White*, 11 Ea. 528; *Collins v. Goodyer*, 2 B. & C. 563; *Thorne v. Jackson*, 3 C. B. 661.

Per cur.—Rule discharged.

ANDERSON V. MCEWAN.

Replevying—Trespass de bonis asportatis against a sheriff for.

“A.” (a sheriff), upon an action in trespass *de bonis asportatis* brought against him as such sheriff, by his plea admitted the goods to be those mentioned in the writ, and that they were replevied by him from “B.” (a third person) without alleging property in the plaintiff, or that the writ directed him to replevy from the plaintiff.

Held, bad, for not shewing property or possession in the plaintiff, or directly identifying him with the action.

The declaration alleged that the defendant wrongfully deprived the plaintiff of the use and possession of the plaintiff's goods, that is to say, one steam-engine, one boiler, and mill gearing and appendages thereunto belonging, one muley saw, one circular saw, one lumber car, one brest wheel, one pinion, one saw shaft and belting, together with other instruments and materials which had been used with the goods aforesaid, in the working of a steam-mill and the business relating thereto.

The defendant pleaded for a further plea, that before the commencement of this suit, to wit, on the 10th of September, 1858, one R. K. C. and J. D. caused a writ of replevin to be issued out of her Majesty's court of Common Pleas, at Toronto, directed to the defendant as sheriff of the county of Essex, and by him as such sheriff received on the day and year aforesaid, whereby he the said defendant as sheriff as aforesaid, was commanded that he should, without delay, cause to be replevied to R. K. C. and J. D. their certain goods and chattels in the declaration mentioned, which they the said R. K. C. and J. D. alleged one J. A. had taken and unjustly detained, and the defendant averred that while the said writ was in force and in his hands as aforesaid, and under and by virtue of the same to the said defendant as such sheriff as aforesaid, took and replevied the said goods and chattels in the declaration mentioned as being the goods and chattels of the said R. K. C. and J. D. mentioned and described in the said writ of replevin, as he was therein commanded, the said goods and chattels having previously and before the said writ of replevin was issued as aforesaid, been fraudulently and illegally removed and severed from the freehold of the said R. K. C. and J. D., to which it had

been annexed and affixed, which were the supposed wrongs in the declaration complained of.

To which plaintiff demurred, assigning as cause that the plea amounted to an argumentative denial of property in plaintiff: no averment that defendant was sheriff or acted as such: that the plea is unintelligible as to whom the property was to be replevied from, or that it was illegal as directing a replevy from a third party: that it did not direct a replevy from the plaintiff: that it acknowledges the taking from plaintiff, and does not legally excuse it.

The defendant says that his said third plea is good.

O'Connor for the plaintiff.

Prince, for the defendant, argued the demurrer.

DRAPER, C. J., delivered the judgment of the court.

The substantial question raised on this demurrer is, whether the defendant (sheriff of the county of Essex), who is sued in trespass *de bonis asportatis*, is justified, by a writ of replevin directing him to replevy the goods, which, as the writ alleged, a third party, not the present plaintiff, had taken from the plaintiff in the replevin suit.

The demurrer admits that the goods, for the taking of which the plaintiff complains, are those which the writ commands the sheriff to replevy. The writ as stated in the plea commanded the defendant that he should, without delay, cause to be replevied to R. K. C. and J. D. their certain goods and chattels (those mentioned in the declaration), which the said R. K. C. and J. D. alleged one J. A. had taken and unjustly detained. The plaintiff contends that because he and not J. A. was in possession of these goods, the defendant was a trespasser in replevying them out of his hands.

Our replevin act has extended the remedy in that form of action beyond that given by the law of England. Of which law Lord Redesdale remarked, the writ of replevin is merely meant to apply to this case, namely, where A. takes goods wrongfully from B., and B. applies to have them re-delivered to him upon giving security, until it shall appear whether A. has taken them rightfully. But if A. be in possession

of goods in which B. claims a property, this is not the way to try that right. And in *Meume v. Blake*, *Coleridge, J.*, in delivering the judgment of the court, observes, "If where a party asserts a right to goods in the peaceable possession of another, he has an election to take them from him by replevin, it is obvious that the most crying injustice might not unfrequently result."

Our statute enacts that whenever any goods, &c., are "wrongfully taken," or "wrongfully detained, the owner, or person or corporation, who by law can now maintain an action of trespass or trover for personal property," may bring replevin for such goods. The venue is local only when the goods have been distrained. In construing this statute it has been held that where trespass would lie for the wrongful taking of goods, replevin would lie also; *Cook v. Fowler*, 12 U. C. Q. B. 568; *Ferrier v. Cole*, 15 U. C. Q. B. 561. The form of the writ assumes that the goods have been taken and are detained, or are detained only, by the party against whom the action is brought, and the sheriff is directed to replevy the goods and to summon the defendant to answer the plaintiff for such taking or detention. The goods are described as they are set forth in the affidavit required to be made before the writ can issue.

As this action must be commenced in a court of record, and if the goods are above a certain value, in one of the superior courts, it is not probable that any attempt will be made to stay the sheriff in making deliverance, by the defendant's attempting to drive the plaintiff into suing out a writ *de proprietate probandâ*. At least such a course has never been taken since the passing of our statute. (See 2 Atk. 37.)

In every case of distress, when a writ of replevin is sued out, it seems assumed that the distrainer is the party in possession of the goods, for the writ directs the replevy to be made of the goods unjustly taken and detained by him. Such is the form of the writ here pleaded, so that while the sheriff is directed to take certain specified goods, one branch of the description of them is, goods which John Anderson had taken and unjustly detained; we must assume that

the writ went on and directed the sheriff to summon the said John Anderson to appear and answer. Now the plea admits the trespass charged, which is taking the goods from the plaintiff, and justifies that act under this writ. It is no part of the plea that John Anderson, named in the writ of replevin, and the plaintiff are one and the same person, nor that the goods replevied were taken and detained by John Anderson by the command of the plaintiff; nor does the plea state that the sheriff did replevy the goods which were taken and detained by John Anderson, nor that the goods, for the taking whereof the plaintiff brought his action, were the same goods which the writ commanded him to replevy. If it be part of the description of the goods, that they were those which John Anderson had taken, it must be essential that the sheriff should shew that such were the goods which he justifies replevying. The action is personal according to *Eaton v. Sothby* (Willes 134), or perhaps a mixed real and personal action. (See 3 Steph. Comm. 459, 461; see also *Holles v. Freer*, 2 Bing. N. C. 719).

Difficulties may certainly arise, if, between the taking of the goods, and the delivery of the writ of replevin to the sheriff, the possession is transferred to a third party, unless the sheriff can take the goods wherever he can find them within his bailiwick. Wherever they are taken as a distress for rent, or damage feasant, or as a payment of a toll, or for similar causes, the goods will be found, constructively at least, in the possession of the distrainer; besides which replevin will always lie against the party by whose command the goods were taken. (Per *Parke*, B., in *Jones v. Johnson*, 5 Exch. 875, referring to *George v. Chambers*, 11 M. & W. 149).

But it may be very different where the plaintiff brings replevin for an alleged trespass to goods of which he had only the constructive, not the actual possession, or where he brings replevin for a detention only, relying on his right of property and of possession incident thereto. It might lead to gross injustice if the sheriff could take goods out of the possession of a party not named in the writ of replevin, and whom he is not directed to summon to appear and defend.

Nor could such a party, so far as I can see, intervene or appear and defend the action, while the person named as defendant in the writ of replevin might, by collusion with the plaintiff, let judgment go by default. It appears to me that the legislature had such a difficulty in view, when by the 6th section of the act they provided that if the sheriff shall have replevied only a portion of the goods mentioned in the writ, and cannot replevy the residue by reason of the same having been eloiigned out of his bailewick by the defendant, or *by reason of the same not being in the possession of the defendant*, or of any other person for him, that then he shall state in his return the articles which he cannot replevy and the reason therefor.

I see no reason why the sheriff might not make such a return, with regard to all the goods mentioned in the writ, as well as with regard to a portion of them.

On the whole I think the plea is bad.

See Stat. 17, Car. 2; Jamieson v. Trevelyan, 10 Exch. 748; Turnor v. Turner, 2 B. & B. 107; Stephens v. Cousins, 16 U. C. Q. B. 329; Lane v. Tewson, 12 A. & E. 116, (note *a.*); Mason v. Farnell, 12 M. & W. 684; Ferrier v. Cole, 15 U. C. Q. B. 561; Lewis v. Read, 13 M. & W. 834; Freeman v. Rosher, 13 Q. B. 780; Broadbent v. Ledward, 11 A. & E. 209; Rooke's case, 5 Co. 99; Galloway v. Bird, 4 Bing. 299; Perrin v. Conley, 14 Q. B. U. C. 53; Cook v. Fowler, 12 U. C. Q. B. 568; George v. Chambers, 11 M. & W. 149; Menie v. Blake, 6 E. & B. 830; Com. Dig. Pleader; Waters v. Ruddell 11 U. C. Q. B. 181.

THE BUFFALO AND LAKE HURON RAILWAY COMPANY V. CORBETT.

Statute 19 Vic., ch. 21—Change of property by.

Held, that the taking possession by the B. & L. H. Ry. Co., under 19 Vic. ch. 21, of the property previously owned by the B. B. & G. Ry. Co. operated to transfer the same into the former, so as to prevent its being seized under a *fi. fa.*, even, although the goods were in the process of transportation from England to their line of road.

TRESPASS for taking 59 tons of iron rails. A second count in trover for the same property.

Pleas : 1st.—Not guilty. 2nd.—Goods not the plaintiffs. 3rd.—That the iron was in possession of H. & H. as warehousemen, who held it for the Buffalo, Brantford and Goderich Railway Company, subject to a lien for freight and charges ; that while it was thus in possession of H. & H., a *fi. fa.* issued from the Q. B., directed to the defendant to levy of the goods and chattels of the Buffalo, Brantford, and Goderich Railway Company, £333 10s. 11d., which one John William James had recovered against them. Whereupon defendant seized a quantity of railway iron of the goods and chattels of the Buffalo, Brantford and Goderich Railway Company, as he lawfully might. (*Quæ. sunt eadem.*)

Issue was taken on all these pleas.

The cause was tried at Brantford, on the 7th of October, 1858, before the *Chief Justice* of Upper Canada. No one appeared for the defence. It appeared the iron had been imported by the Buffalo, Brantford & Goderich Railway Company, and was at Kingston on the way up on the 28th June, 1856. The present plaintiffs claimed it under the 19 Vic., ch. 21, sec. 3, (1856,) and the third clause of schedule No. 1 to that act. It was sworn that the defendant did not seize it until the autumn of 1857, and that the new company took possession under this act on the 28th of June, 1856.

The plaintiffs had a verdict for £440.

In Michaelmas Term, *Kirkpatrick*, Q. C., obtained a rule *nisi* on affidavits, on the ground that the trial took place in the absence of defendant, or of any one in his behalf, and that the verdict is contrary to law and evidence, in that the iron did not become the property of the present plaintiffs under the statute incorporating them.

The affidavits were, 1st—of the partner of the defendant's attorney, who swore that he managed the case ; that, finding it to be impossible to attend the assizes at Brantford for this trial, he told defendant so, and requested him to procure other counsel, and by defendant's direction telegraphed to the Hon. J. H. Cameron, requesting him to take a brief, but got no answer ; that he then, by defendant's direction, telegraphed to M. C. Cameron, Esq., for the same purpose, and received for answer that he was absent from

Toronto; that on Wednesday (which apparently refers to the 7th of October, the first day of the assizes) he telegraphed the plaintiff's attorney enquiring when defendant should be there, and received an answer, "come up at once," which he directly communicated to defendant.

The other affidavit was made by the defendant, stating that he received information from his attorney's partner, that notice of trial was given for the 6th of October last. He states the telegraph message having been sent to the Hon. J. H. Cameron on the 4th of October, and that to M. C. Cameron on the 5th of October; that he left Kingston on Thursday morning, and arrived at Brantford at daylight on Friday morning, and found the cause had been tried the day before; that one William Falconer, a necessary witness, residing in Chicago, was written to, as he was informed, to come, and did come on Thursday, after the trial; that he is informed and believes he has a good defence on the merits.

Jas. Patterson shewed cause, filing an affidavit from plaintiff's attorney, which shewed that notice of trial had been given a month before the assizes; that the cause was entered No. 5 on the defended list, and was not taken until the evening of the second day, when the plaintiff's attorney was "driven by the judge to take on some cause, and this being then in turn, he reluctantly took it up;" that the action was commenced on the 29th day of May preceding, and that he fully expected the defendant would be in Brantford prepared to go to trial whenever the cause should come on.

Kirkpatrick contra, argued that a new trial should be granted, as it was doubtful on the merits whether plaintiffs were entitled to recover. And he argued that on the agreement set forth in the statute, this railway iron did not pass to the plaintiffs.

DRAPER, C. J., delivered the judgment of the court.

I really see no ground to interfere with the verdict. It was sworn at the trial that this iron had belonged to the Buffalo, Brantford and Goderich Railway Company, and had come from England, and was at Kingston on the way up

on the 28th of June, 1856, when the new company, the present plaintiffs, took possession under the act 19 Vic., ch. 21. The third section of that act enacts, that from and after the delivery by the said Buffalo, Brantford and Goderich Railway Company to these plaintiffs of the line of railway, and the acceptance thereof by them, or any part thereof, in the name of the whole, in pursuance of the agreement referred to in the act, and set forth in a schedule thereto, the said railway and all the *property* whether the same be real or *personal*, and whether situate in Canada or elsewhere, of the Buffalo, Brantford and Goderich Railway Company, shall become and be the property of the plaintiffs.

The statement given at the trial, that this delivery did take place on the 28th of June, 1856; that the iron in question was the property of the Buffalo, Brantford and Goderich Railway Company, and was on that day at Kingston, is no further or otherwise met than by the general statement in the defendant's affidavit, that he has a good defence on the merits.

I think that statement insufficient to warrant our setting aside the verdict. And I must add I should have felt great difficulty in interfering on the other grounds stated, for it is by no means clear to me that the non-appearance at the trial of any one to represent the defendant is so accounted for, as to afford any reasonable ground for the court to relieve the defendant, even as a public officer, acting under the process of the court. As from the letter produced, it would seem he had not paid over the money; the plaintiff in the execution appears to have had an interest in looking after the defence if notified.

Per cur.—Rue discharged.

ALEXANDER V. BIRD.

Crown Lands—Rights of purchasers—Timber agents.

Held, that the Crown timber agents have no legal right to dispose of the timber upon lands sold by the Crown lands agents, and that they can in no way affect the rights of such purchaser as against trespassers. The case of *Glover v. Walker*, 5 U. C. C. P., 478, affirmed.

TRESPASS for breaking and entering lot 21, 1st concession of Hungerford, throwing down fences, cutting trees and converting same to defendant's use.

Pleas: 1st.—Not guilty. 2nd.—Close not plaintiff's. 3rd.—That our sovereign lady the Queen was seised in fee of the close and of the trees, and that defendant, after the breaking and entering, and after cutting down the trees, paid to H. M. £30, in full satisfaction and discharge of the breaking and cutting. 4th.—Seisin of the Crown as in 3rd plea, and that defendant, by leave and license of the Crown, entered and cut the trees.

Issue on the 1st and 2nd pleas.

De injuria replied to 3rd and 4th.

The case was tried in March, 1857, before *Hagarty, J.*, at Belleville.

The trespass in entering the lot and cutting elm and other timber on the uncleared part of it, and also in throwing down plaintiff's fences in order to get to the timber and to haul it away, was proved.

The lot in question was a clergy reserve. On the 8th of November, 1856, plaintiff, who had been about three years living on this lot, clearing and fencing, paid to Mr. McAnany, the Crown land agent, rent for that period of his occupation, and (as I presume) a first instalment of the purchase-money, as it appeared the land had been valued at plaintiff's instance with a view to purchase. This valuation was for the land with the timber on it. The defendant had previously applied to Mr. McA. to purchase, and was informed that the plaintiff had previously applied, and had had the lot valued. The plaintiff had given notice to defendant's foreman not to cut; this was about the 10th of November, 1856. The defendant's man had been cutting from the beginning of October, and the timber was not removed until February.

On the defence it was proved that Mr. Way, the Crown timber agent, had, in 1854, taken from Mr. McAnany's books a memorandum that this lot was a vacant lot; that being a clergy reserve, he had no authority to give license to cut the timber, and gave none in this instance. It seems to be an established practice for parties desirous of cutting timber off lands, the title to which is in the Crown, to give notice of his intention to cut upon such lands, in which case 25 per cent. less is charged for what is called trespass duty, which

seems to be a charge of 50 per cent. additional on the price of timber, which would be charged if the party had previously obtained a license. The defendant gave Mr. Way such a notice, and afterwards returned to him an oath that he had cut 140 pieces of elm timber, taking no notice of "bed timber," which had been cut, and for which the timber agent had no instructions to charge. And on the 23rd of February, 1857, he paid the timber agent £24 for this elm. This was more than three months after this action was brought.

It further appeared that the purchaser of public lands is restricted, so long as any part of the purchase money is unpaid, from cutting timber except for use on the land, or by way of clearing. But that if any license is granted to the purchaser to cut the timber, he must pay for it according to the usual terms, and the amount is carried to his credit in the purchase of the lot, and if any one else has cut the timber on a license from the Crown, the price paid by him is also carried to the purchaser's credit.

It was sworn that the lot was poor land, deriving a large portion of its value from the timber which was on it; that on cutting it, the tops, &c., were left slashed over the ground, which, of course, would be a hindrance and injury to the owner who desired to clear the land for farming.

At the trial, before *Hagarty, J.*, a verdict was entered for the plaintiff for £37, subject to the opinion of the court.

The case was argued in Michaelmas Term by *O'Hare* for plaintiff, and

Wallbridge Q. C., for defendant.

DRAPER, C. J., delivered the judgment of the court.

The case of *Glover v. Walker* (5 U. C. C. P. 478,) decided that the vendee of the Crown who has paid one or more instalments, and has entered into peaceful occupation of the land purchased, is entitled to support an action of trespass in support of such possession against wrongdoers, so long as the Crown does not dissent to such occupation. And if not bound by that decision, which I think we are, I should feel every disposition to uphold it as founded in reason and good

sense. The 6th section of 16 Vic., ch. 159, provides for the Commissioner of Crown Lands giving an instrument under his hand and seal, in the form of a license of occupation, to any purchaser intending to settle on public land, and enable such settler to maintain actions or suits in law or equity as fully as he could under a patent from the Crown; and this act does not speak of receipts for instalments as giving the purchaser any particular right. Sec. 17, however, provides for the appointment of agents to carry out the provisions of the act; and it is notorious that they do make sales and recover payments on account of public lands under executive authority. It would appear that the license of occupation is rarely issued, as we have occasion to know from many causes that have been before us; the purchaser in the country, especially where he settles immediately on the land bought, apparently rests content with the receipt; and so far as is shewn, it does not appear the duty of the local agent, making the sale and receiving a deposit on account thereof, to procure such license for the purchaser, though the 24th section affords a reason why it should not be done.

In accordance with the spirit of that decision, I think we should hold the party who obtains a receipt as a purchaser, and who enters and continually occupies in pursuance thereof, to be in possession of the whole parcel or lot which his receipt refers to. In the receipt this case differs entirely from that of *Henderson v. McLean*, reported in 8 C. P. U. C. 42, where, upon the facts proved, it appeared to us the plaintiff was not in actual possession, and we held that the receipt by itself would not enable him to maintain trespass upon the 3rd plea of payment to the Crown in satisfaction for the timber cut.

I do not gather from the evidence that the practice of giving notice to the agent for the Crown timber, of an intention to go and cut timber without license upon public lands, with respect to which such agent is not authorised to grant a license to cut, has the sanction of government instructions; that it is very convenient to authorise the agent where trespassers have cut Crown timber to compromise with them, instead of prosecuting them, and to receive in

satisfaction a sum exceeding by fifty per cent. the price charged where a license is previously obtained, I can readily understand. But this proceeding, in which the party cutting timber has no license, and yet has a *quasi* understanding as to the price he must pay for what he cuts, is a very different thing, and may give rise to much difficulty, and it cannot, at all events, be assumed that the Crown, after selling the land with the timber on it, though they may restrict the vendee from cutting off the timber except for necessary purposes, while the land is unpaid for, reserve a right, even to sell the timber to a stranger, and still less to enable a stranger to elect to take the timber and pay the Crown for it as a qualified trespasser.

It does not appear to me such a course would be reasonable or consistent with the rights of a party who has been treated as a purchaser of the soil.

The evidence certainly does not shew any authority in the Crown timber agent, directly or indirectly, to dispose of timber growing upon lands sold by the Crown land agent, nor by an *ex post facto* settlement, to deprive the purchaser in actual possession of the right to maintain actions against those who intrude upon them. It appears to me, therefore, that the payment made to the timber agent is not even a payment by which the Crown would be prevented from treating the defendant as a wrongdoer, and *a fortiori* it cannot affect the plaintiff's rights and interest.

Still less can I hold that the facts proved shewed a license from the Crown. Admitting the right of the Crown to exist as if no sale to the plaintiff had been made, the facts proved would amount to no more than accord and satisfaction after the trespass committed, and therefore the 4th plea is not sustained.

On the whole, I think the plaintiff is entitled to the *postea*.

KENNEDY V. MOODIE, ET AL.

Sale of goods under fi. fas.—Application of proceeds of—Sheriff's liability for money had and received.

M., a sheriff, seized and sold under execution, goods and chattels to the amount of £3823 12s. 2d., *the terms of the sale were cash*, but it was understood and agreed that the purchaser might make such arrangements as he could with the execution creditors. All of whom, except the last ten, required *cash*; they agreed to give time, and take notes. In the settlement £2762 16s. was paid to the sheriff, and notes were given for £1146 17s., making in all £86 1s. more than the amount of the purchase. Upon an action brought against the sheriff for that amount, he proved that he had paid upon the executions all moneys received except £165 7s. 10d., and he claimed £442 2s. for fees and poundage.

Held, that he was not liable under the circumstances, not being shewn to have received more than he should have.

Seemle, why was the deputy-sheriff joined in the action?

The facts of the case are, 1st.—In the year 1857 the sheriff of the county of Hastings, the defendant Moodie, had a number of *feri facias* in his hands, against Bull Brother, in favour of different plaintiffs.

That the deputy-sheriff, the defendant Ockerman, sold under *venditioni exponas* issued on said *fi. fas.*, the stock in trade of Bull Brothers, amounting, at stock-book prices to the sum of £6747 10s. 11d.

That plaintiff purchased the stock at 11s 4d. in the pound, the proceeds amounting to the sum of £3823 2s. 2d.

That the sheriff sold stock for cash, but permitted purchasers to make arrangement for time with such plaintiffs in suits against Bull Brothers, or their attorneys, as might be willing to grant time on their own responsibility, on their executions.

That the attorneys for execution creditors required cash, with the exception of George E. Henderson, who required cash on an execution in his own favour, amounting to £157 18s. 3d., but was willing to give time on ten other executions, on which he was acting as plaintiff's attorney, and which were the last placed in the sheriff's hands.

That the sheriff received from Kennedy,

the plaintiff.....	£2762	16	8
Also goods sold at private sale not included in stock-book	38	6	8
Also proceeds of goods of Bull Brother, at Madoc, village of Hastings.....	447	14	9
Total amount received by sheriff	£3248	17	5

That the sheriff paid in Parson v. Bull ..	150	0	0
Also to Commercial Bank, on executions assigned to them	2347	1	2
And attorney's costs on the same.....	78	13	10
Also executions in favour of Commercial Bank	349	16	4
Also Henderson v. Bull Brother	157	18	3
Amount of expenses and sheriff's fees, &c.	442	2	0

Total amount expended by sheriff, for which he is to produce receipts from parties named..... £3525 11 7

That after paying the sheriff the above amount of £2762 16s., the sheriff left Kennedy to settle the balance of his bid, whatever it might be, with George E. Henderson, to apply on his executions.

That afterwards Kennedy gave George E. Henderson notes to the sum of £1146 17s., payable at several months' date, by permission of the sheriff.

The case was argued by *Wallbridge*, Q. C., and *O'Hare*, for plaintiff; and *Bell*, of Belleville, for defendant. The following authorities were cited, 4 Taunt 197; *Coles v. Wright* and 8 Taunt. 136; *Ray v. Davies*.

DRAPER, C. J., delivered the judgment of the court.

According to the facts agreed upon, I do not see how the plaintiffs can maintain their action.

The defendants under certain executions had seized the effects of Bull Brothers, to the value, as per their stock-book of £6747 10s. 11d.

This stock was put up for sale, in the lump. The bids to be at so much in the pound on the amount in the stock-book.

The plaintiffs purchased this stock at 11s. 4d. in the pound, and consequently had to pay £3823 12s. 2d., erroneously stated in the case at £3823 2s. 2d.

The terms of the sale were cash, but it was agreed the purchasers might make any arrangements for time with the

execution creditors of Bull Brothers, to pay them. The creditors on all the executions except the ten which were last received by the sheriff, required cash. The attorney for these ten agreed to take the purchasers' notes at certain dates.

The purchasers of the goods then paid the
sheriff £2762 16 0

And the sheriff left the purchasers to settle whatever the balance due upon their bid might be, with the attorney for these ten creditors.

The purchasers, in settling with him, gave
their notes for..... £1146 17 0

£3909 13 0

They were only bound to pay £3723 12 0

Consequently they paid or gave notes for
an excess of..... £86 1 0

The purchasers are plaintiffs, in this action, to recover from the sheriff and his deputy the sum of £86 1s., as money received to their use.

These are all the material facts in the case as appears to me, though there are some others stated, to which I will refer presently. Upon these facts I do not perceive how this action can be sustained, for upon the statement contained in the 9th and 10th paragraphs of the case, the notes were only to be given *for the balance due* on the amount of the purchase *after deducting* therefrom £2762 16s., which was paid to the sheriff; and the notes should have been only given for £1060 16s., whereas they were given for £1146 17s. It is not shewn how the error arose; but it is no part of the case that either of the present defendants caused it, and therefore I do not see on what ground it can be said the defendants have received £86 1s. to the plaintiff's use. In giving notes for this excess, those notes enure to the benefit of the ten executions last received by the sheriff, without shewing that all prior claims are satisfied, and I suppose the other facts stated were introduced to bring up that question.

Those facts are, that the sheriff also received two sums of

£38 6s. 8d., and £447 14s. 9d., from plaintiffs, on account of other goods of Bull Brothers, forming no part of those bought for £3823 12s. 2d., thus making the total receipts of the sheriff on account of executions in his hands to be £3248 17s. 5d. Then follows a statement of the sheriff's disposal of this money. He shews he has paid on executions against Bull Brothers, and attorneys' costs thereon, £3083 9s. 4d., which would leave £165 7s. 10d. in his hands unaccounted for. But he claims £442 2s. for sheriff's fees and expenses, which the plaintiffs deny to be correct, and which the sheriff's counsel says he is willing to submit to taxation, but he has not produced any proof, except as to £25, of its correctness.

Whether his legitimate costs and poundage would amount to £165 7s. 10d. I do not pretend to say, but admitting that they will not, I still do not see how the plaintiffs can recover back any part of this balance from the sheriff, or how it can be said, that the sheriff received any money to their use. What he received, and more than he received, they were bound to pay him in cash. By agreement with him they pay only a certain sum in cash to him, and are to give notes for the balance, whatever it may be, to other parties. They gave notes for more than the balance, by some mistake, to which the sheriff is no party. On what principle they can make the excess for which they gave the notes, money had and received by the sheriff to their use, I cannot make out. The sheriff is no doubt bound to account for all money he has received by virtue of their executions, but he is not accountable in that point of view to these plaintiffs; nor do I understand why the deputy sheriff is made a defendant.

I think the defendants are entitled to the postea.

ARMOUR V. GATES.

Promissory note—Given by Secretary of a company—Personal liability thereon.

G. being the secretary of an insurance company, gave the following note for a loss sustained by an insurer therein :

“£1000 cy.

“Sixty days after date I promise to pay to the order of James S. Wood, Esq., of Colborne, the sum of one thousand pounds currency, value received by the Ontario Marine and Fire Insurance Co., payable at the Gore Bank in Hamilton.

“(Signed)

“C. HORATIO GATES,

“Secretary O. F. Company.”

Held, that he was personally liable thereon, and a plea, that the same was taken for a liability of the company, and with the understanding that they were to pay the same *held* bad, as setting up a *cotemporaneous* verbal agreement to vary the express terms of a written contract.

Held also, that the 60 days given by the note, the policy being at the same time marked “cancelled,” was a sufficient consideration therefor.

This action was brought to recover the amount of a promissory note dated the 2nd of October, 1854, whereby defendant promised to pay to the order of James S. Woods, 60 days after date, £1000, for value received by the Ontario Marine and Fire Insurance Company, and endorsed by the payee to one Peleg Wood, and by him to the plaintiff.

Pleas: 1st.—Did not make. 2nd.—Payment. 3rd.—That the note was made by defendant at the request and for the accommodation of J. S. Wood, and without any value or consideration whatever for the making or payment thereof by defendant, and was indorsed to the plaintiff after it became due, and without consideration therefor, paid by Peleg Wood or plaintiff, and without the knowledge or consent of defendant, and that plaintiff took the same with knowledge of the want of consideration and accommodation aforesaid. 4th.—On equitable ground, that defendant was at the time of making the note, secretary of the Ontario Marine and Fire Insurance Company, which company was indebted to the said James S. Wood in £1000; that defendant, as secretary of the company, at the request of the said J. S. Woods, and without consideration to himself, made the note and signed it as secretary, and delivered it to the said J. S. Wood on the understanding that the company were alone liable for the payment; that J. S. Wood was the holder when the note became due; that the company became insolvent, and have been paying dividends to their creditors; that J. S. Wood, without defendant's knowledge,

claimed payment of the note from the company, and from time to time gave time to them, and recovered part payment from them, and afterwards indorsed the note to Peleg Wood, who took the same with full knowledge of the premises, and without having paid any consideration for it, and Peleg Wood thereafter received another dividend from the company, and then indorsed the same to plaintiff, who took it with full knowledge of the premises, and without having paid any consideration for it. The plaintiff took issue on all the four pleas, and demurred to the last.

At the trial at Cobourg, in October last, before *McLean*, J., the plaintiff produced the note, and proved defendant's signature to it. It was as follows :

“£1000 cy.

“*Hamilton, 2nd October, 1858.*

“Sixty days after date I promise to pay to the order of James S. Wood, Esq., Colborne, the sum of one thousand pounds currency, value received by the Ontario Marine and Fire Insurance Company, payable at the Gore Bank in Hamilton.

“(Signed),

“C. ORATIO GATES,

“Secretary O. F. Company.”

It was proved that James S. Wood had effected an insurance with the Ontario Marine and Fire Insurance Company, against fire on goods in his store in the village of Colborne for £1000, for 12 months, from the 14th of August, 1854, to the 14th of August, 1855, and had received a policy of assurance, dated 18th August, 1854, under the company's seal, and signed by the president and by the defendant, their secretary. And among other things, it was covenanted, that in case of loss, &c., the company should have the right to replace the property lost, with other of the same kind and equal goodness, by announcing their intention so to do within thirty days after the notice of the loss, or to pay for the same in sixty days after proof of the loss.

The property was damaged or destroyed by fire to the extent of the amount insured on the 17th of September, 1854. J. S. Wood furnished the necessary proof to the company of his loss, and right of indemnity to the extent of £1000. The amount insured not being disputed, he became entitled to recover that sum in 60 days after the proof was given. It

was proved to have been usual for the company to give to persons who were insured, and who were entitled to be paid, by reason of any loss or damage, a note at 60 days, as soon as the loss, &c., was established—just as was done in this instance, which would fall due at the time the loss would be payable according to the consideration of the policy—a practice adopted for the benefit or convenience of the insured. In this way the present note was given, and having been endorsed by the plaintiff and Peleg Wood, it was discounted at the agency of the bank of Montreal at Trenton, and at maturity it was protested for non-payment, and J. S. Wood had to procure assistance in order to get it taken up, and the note is in the present plaintiff's hands as trustee for some of the parties who assisted him. Before the note became due the company became embarrassed, and finally insolvent. A long correspondence was put in between J. S. Wood and W. Power, who succeeded the defendant as secretary to the insurance company in November, 1854. In all the letters from J. S. Wood the company were called upon as the parties liable on the note to pay, and in all the demands and enquiries made, they alone were referred to as liable. The correspondence shewed every possible urgency on Wood's part, and on the part of the company a full admission of liability, and a promise on the part of the company to pay as fast as they could collect funds from their shareholders. But by the 9th clause of the act of incorporation, the instalments on the capital stock were limited to five per cent. in any six months, and were only payable after sixty days' notice. In June, 1856, the company paid £50, in December, 1856, £75, and in July, 1857, £50. And this note is referred to in one of the receipts as the promissory note of the company, No. 48, in favour of J. S. Wood, and in another as promissory note No. 48. The bank of Montreal were, after considerable delay, paid, and this note was taken up from them by J. S. Wood and Peleg Wood, who procured the aid of another to enable them to pay the bank of Montreal, and to whom they gave a confession of judgment, and the note now sued on was put into plaintiff's hands as a trustee to collect and pay off the liabilities incurred, in order

to pay the bank of Montreal. By consent a verdict was entered for the defendant, with leave to plaintiff to enter a verdict for him for £943 11s. 2d., balance due on the note, if, in the opinion of the court, the plaintiff is entitled to recover, the court being at liberty to draw the same inference of facts from the evidence that a jury might draw, and without prejudice to any proceedings in Chancery.

In Michaelmas Term the case was argued on the facts, and on the demurrer by *Cameron*, Q. C., and *Strong*, for plaintiff, and by *D. B. Read*, for the defendant.

For the plaintiff were cited *Balfour v. Official Manager of Sea, Fire, and Life Assurance Company*, 3 Jur. N. S. 1304; *Mare v. Charles*, 5 E. & Bl. 978; *Nicholls v. Diamond*, 9 Exch. 154; *Thomas v. Bishop*, 2 Str. 955; *Russell v. Phillips*, 14 Q. B. 891; *Strong v. Foster*, 17 C. B. 201; *Chadwick v. Maden*, 9 Hare 188.

For the defendant were cited, *Lindus v. Melrose*, 3 Jur. N. S. 619, and in Exch. Ch. 4 Jur. N. S. 488; *Manley v. Boycot*, 2 E. & B. 46; *City Bank v. Cheney*, 15 U. C. Q. B. 400; *McLae v. Sutherland*, 3 E. & B. at p. 37; *Allen v. Sea, Fire, and Life Assurance Company*, 9 C. B. 574; *Aggs v. Nicholson*, 1 H. and N. 165.

Mr. Read also cited several cases to shew that parties who take overdue notes are bound by all equities affecting them, and he agreed that it could not be shewn to support this declaration, that any person but those named in the declaration had given consideration.

DRAPER, C. J., delivered the judgment of the court.

The facts are not either numerous or complicated. The Ontario Marine and Fire Insurance Company had granted to J. S. Wood a policy against loss by fire on goods to the sum of £1000, which policy contained a covenant on the part of Woods, that in case of loss or damage the company should have the right to replace the property lost or damaged with other of the same kind or equal goodness, by announcing their intention so to do within thirty days after notice of the loss, or to pay for the same in sixty days after proof of the loss or damage thereon. A loss by fire

occurred on the 17th September, 1854. On or before the 2nd October following, the Company must have been satisfied with the proof of the loss, and must have also determined to pay the same, for on that day the note sued upon was given, and there is no question that it was given on account of the company's liability on their policy for this loss. The defendant signed the note, promising to pay to the order of J. S. Wood, the insured, £1000, sixty days after date, value received by the insurance company, and he added to his name the words, "secretary O. F. company." At the time the note was given the word "cancelled" was written on the back of the policy. The note was not given as any particular favour to J. S. Wood, but because it was customary with the company when any loss was established to give a note in this manner as an accommodation to the insured, and the defendant signed because he was their secretary, and received no value for so doing. J. S. Wood procured Peleg Wood to indorse, and discounted the note so indorsed with the bank of Montreal. It was dishonoured at maturity, and after considerable delay, Peleg Wood having procured other parties to join him, it was taken up by them. Goslee was one of the parties who joined, and this note and a confession of judgment was given to him for his security. It is in the plaintiff's hands only that he may collect it, and apply the proceeds in discharge of the liabilities incurred in taking it up out of the hands of the bank of Montreal. After it was dishonoured, repeated applications were made by or on behalf of the parties interested to the company for payment, in which or some of which they were treated as liable to pay this note, and they have paid some small dividends or instalments on it, not much more than the accruing interest. This action was not brought until the 24th of July, 1858.

First, as to the plea of *non fecit*. This only puts in issue the fact of the defendant making the note as his own note, and upon this issue, I am clearly of opinion the plaintiff is entitled to succeed. His signature is proved, and the additional words, "secretary O. F. Company" cannot make the insurance company liable, for no facts as to his power to

bind them are proved, as in *Murray v. E. India Co.*, (5 B. & A. 204,) and the act incorporating this company, (12 Vic., ch. 166, which is a public act,) assuming that it extends to the accepting bills and the making notes, (sec. 8,) enacts that all policies, checks, and other “instruments shall be subscribed by the president, or in his absence, by the vice-president, or in case of his absence, by any three of the directors for the time being and *countersigned by the secretary.*” Nor will these words, “secretary,” &c., exclude personal liability. The principle recognised and acted upon in the *Bank of Montreal v. Delatre*, (5 U. C. Q. B. 362,) *Owen v. VanUster*, (10 C. B. 318,) *Nicholls v. Diamond*, (9 Ex. 154,) and *Mare v. Charles*, 5 E. & Bl., must also govern here. According to the tenor of the note, by the plain meaning of the words used, the defendant personally promises to pay; he uses no form of expression to shew that he is professing to bind the company signing only “as secretary,” or *for* the company or *per proc.* the company, so as to disclaim individual undertaking. It is true that the note expressed value received by the company, and I have no doubt the defendant signed at their instance, and on their account, and expected they would supply funds to pay the note when due, but this will not qualify the effect of a personal engagement, if there be one, and I think this note clearly shews one. The case of *Lindus v. Melrose et al.*, (3 Jur. N. S. 619, 4 Jur. N. S. 488,) on which Mr. Reade relied, has really no application. It was decided under the English Joint Stock Companies’ Act, the 43rd section of which enacts, “a promissory note or bill of exchange shall be deemed to have been made accepted and endorsed on behalf of any company registered under this act, if made, accepted, or indorsed in the name of the company by any person acting under the express or implied authority of the company.” And the question was, whether the promissory note sued upon which was in the body of it “on account of the L. & B. &c., Co.,” and was signed by the three defendants, adding “directors” to their signature, was the note of the company or of the individuals who signed it, and the court held it was the former, and that the defendants were not personally liable.

The difference between that and the present case is sufficiently obvious.

As to the plea of payment, it requires no observation.

I think the third plea is not proved, because, in the first place, there was evidence of some consideration for making the note. The policy was marked "cancelled," and was, as I gather from the evidence, left in the possession of the insurance company, and as the note would have the usual days of grace, the right to be paid would not accrue until 63 days, instead of 60, after proof of the loss. But, waiving this, I think the evidence shews the plaintiff to be in the situation of a holder for value. In order to get this note discounted, Peleg Woods endorsed it, being a subsequent endorser to the payee. Peleg Woods procured Gosler to join him in another note in order to take this up, which note Peleg Woods or Gosler, or both together, provided funds to pay, and the plaintiff is a trustee for the parties who provided such funds. Peleg Woods therefore was an endorsee before the note became due, and has paid for such endorsement to him.

As to the fourth plea, the defendant sets up, 1st.—That he made the note at the request of J. S. Wood. I think there is no proof of an implied request, certainly none of a direct request. 2nd.—That he made it without consideration to himself. This is so, but it is immaterial, as there was a good consideration for the note, and the position of J. S. Wood was altered to his prejudice by his acceptance of it. 3rd.—That he delivered it to J. S. Wood on the understanding that the company were alone liable for the payment. This is setting up a contemporaneous parol agreement to change the terms of the note. But in the language of *Welles, J.*, in *Strong v. Foster*, (17 C. B. 201, 221,) you cannot shew by parol evidence that the contract of a party to the bill or note was intended at the time it was made to be other than that which is apparent on the face of the instrument itself. See also *Davies v. Stainback*, (6 De Gex. M. & G. 679,) *Pooley v. Harradine* (7 E. & B. 431). See also, *Webb v. Salmon*, (14 Jur. 33,) *Ford v. Beach*, (11 Q. B. 842), *Adams v. Wordley* (1 M. & W. 374.) There is no

proof of giving time to the company except the delay to take steps against them, which, if the policy was cancelled, would have at least been difficult. And if the defendant was under no circumstances to be liable on the note, the giving time is an unnecessary and useless allegation.

For these reasons, I think the verdict should be entered for the plaintiff according to leave reserved.

As to the demurrers, the plea seems to me to amount in substance to an argumentative plea of *non fecit*. It states that the defendant did not make this as his own note, but that he made it *as* secretary of the company, and delivered it to the payee on the understanding that the company were liable to pay it, and that he was not. This is pleaded to the note as declared, and contradicts the express terms of that note. The authorities already cited establish that a parol agreement cannot be set up to contradict the written contract, in other words, to shew that the defendant did not contract to do, what, according to the note, he promised to do; and the same authorities shew that, in this respect, the rule is the same in courts of equity and of law.

The plea is bad, therefore, whether as an equitable or a legal defence.

DIGEST

OF

CASES REPORTED IN VOL. VIII., BEGINNING EASTER
TERM, 21 VIC., ENDING HILARY TERM, 22 VIC.

ADMISSIONS.

Evidence.]—"M." by letter admitted that certain property, the subject matter in dispute, was in the hands of a third party, and afterwards brought his action against the defendant for it. *Held*, that such letter was evidence in the cause, and the jury having found, upon it, for the defendant, the court ought not to disturb their finding. *Macdonald v. Wood*, 426.

AFFIDAVIT.

See ARREST.

AGENCY.

Evidence — Misdirection.]—*Held*, that the question of agency is a question of fact for the jury, there being some evidence to go to them of which the judge must decide; and, *held*, that the entry of a party on the assessment roll as resident, when in fact he was a non-resident, did not render his assessment nugatory. *Held*, also, that a statement and demand of taxes are not a ne-

cessary condition precedent to uphold a distress for taxes in the case of non-residents. *DeBlaquire et al. v. Becker et al.*, 167.

AGENT.

See NUISANCE.—PRINCIPAL.

AGREEMENT.

Evidence.]—The plaintiff was engaged by one, on behalf of all the owners of a steamer, to sail her by the season. This engagement was verbal, and with the understanding that it was not determinable without some notice: he sailed her during the years 1855 and 1856 under this arrangement, during which time the owner who had made the arrangement sold out, and during the summer of 1857 the vessel was not run. The plaintiff brought this action, contending that he was entitled to his salary for that year under the agreement. *Held*, that the evidence shewed no agreement for 1857. *Dick v. Heron*, 67.

AMENDMENT.

By striking out names.]—See JOINT CONTRACT.

Striking out parties—Common Law Procedure Act.]—The names of parties to suits will not be struck out, unless it appears that they were inserted by mistake, and not with the object of fixing the party so joined with an unjust debt or liability. *Tulloch v. Wells et al.*, 394.

APPEAL ACT.

See RULE.

APPEAL.

Proceedings in.]—Upon an action to stay the proceedings in appeal, on the ground of irregularity, the court refused to make the rule absolute, although no notice of the grounds of appeal had been served or formal leave to appeal asked, all parties having understood that the case would be appealed. *Grant, administratrix, v. G. W. Railway Co.*, 348.

APPLICATION.

Of proceeds of sales.]—See SALE OF GOODS UNDER FI. FAS.

ARREST.

1. Upon an action brought for malicious arrest, where the jury, notwithstanding strong evidence to support the defendant's affidavit, and the judge's charge in his favour, found for the plaintiff, the court set aside the verdict, and granted a new trial without costs. *Scanlon v. McDonagh*, 82.

2. *Ca. Sa.—Affidavit.*]—*Held*, that a party making an assignment for the benefit of his creditors, to prevent his goods being taken in exe-

cution at the suit of one of his creditors, who had recovered a judgment against him, was liable to arrest. It is sufficient to swear either fact, that the debtor had parted with his property to prevent its being taken in execution, or that he had made some secret or fraudulent conveyance to prevent its being taken in execution. *Maxwell v. Ferrie*, 11.

3. *Evidence.*]—Upon an action brought for malicious arrest, the jury found for the plaintiff, giving him £75. The court, although not altogether satisfied with the verdict, refused a new trial, there being evidence sufficient to uphold it, and the question being one entirely within their province. *Knox v. Cleveland*, 176.

4. *Surrender of bail—Escape—Sheriff.*]—A prisoner on bail to the limits, having been rendered to the sheriff, and while the officer in whose custody he was placed was otherwise engaged, made his escape. *Held*, that the sheriff was justified in re-taking and committing him to close custody, and that when the defendant endeavoured to shew he was improperly held, he must swear positively there was no process, and not leave it to be inferentially inferred.—*Arnold v. Andrews*, and *Scatcherd v. Andrews*, 467 and 473.

ASSIGNMENT.

For benefit of creditors.]—See CREDITORS.—REGISTRATION, 1.—VENDOR.—EJECTMENT, 2.

1. *Change of possession—Fi. fa.*]—*Held*, that it is not a question of law, but a matter for the decision of the jury, under all the circumstances, whether there has been an immediate and continuous change of possession, under an assignment,

sufficient to satisfy the statute. *Waldie v. Grange, Sheriff*, 431.

2. *Of stock—Registration.*]—*Held*, that an assignment of stock in the Provincial Insurance Company, duly executed by assignor and assignee, for a good consideration, with proper notice to the company, is valid without further registration, provided the assignor is not indebted to the company and owes no calls. (22 Vic., ch. 63, since in force.) *Crawford v. Provincial Insurance Co.*, 263.

3. *Mortgage.*]—Upon ejectment brought to try the title to land, *Held*, that the word "assigns" in the conveyance under which the plaintiff claimed did not pass a fee. *Moran v. Currie*, 60.

ASSIGNEES.

See MORTGAGEE.

ATTACHMENT.

See SHERIFF, 1.

ATTORNEY.

See COSTS, 3.

BAIL.

Recognizance.]—The defendant being arrested, gave bail to the sheriff, under the 7th section of 16 Vic., ch. 175: within thirty days a recognizance was entered into as bail to the limits, and a certificate of its allowance given by the deputy-clerk of the crown. The defendant having broken the condition of this recognizance, an action was commenced thereon, but failed, the recognizance having been entered into, before a person not duly authorised to take it. The plaintiff then applied to a judge in cham-

bers to get the certificate of allowance of the recognizance to the limits set aside, which was granted.

Upon a rule taken out to rescind the order of the judge, who set aside allowance of the recognizance to the limits, it was made absolute. *Draper, C. J.*, concurring, upon the ground, that if it stood it would prevent an appeal to decide whether the bail were liable. *Macfarlane v. Macwhirter*, 76.

BILL OF EXCHANGE.

Damages.]—*Held*, that six per cent. damages are chargeable upon a protested bill of exchange drawn in Upper Canada, accepted in Upper Canada, payable in the United States, upon the authority of *Ross v. Winans*, 5 U. C. C. P. 185. *American Exchange Bank v. McMicken*, 59.

BILL OF SALE.

Consideration.]—*Held*, that a bill of sale (registered under the statute), for the money consideration of five shillings, with a separate declaration of trust referred to and forming part of the instrument (not registered), was invalid, and that the conveyance registered must shew the true and full consideration for which it is given. *Arnold v. Robertson*, 147.

BONA FIDES.

See CHATTEL MORTGAGE.

BOND.

See BUILDING SOCIETIES.

BUILDING SOCIETIES.

Their right to take collateral secu-

rities from strangers—Bond.]—*Held*, that the recitals in a bond do not limit the condition, so that an action cannot be brought, except for a breach which clearly comes within the meaning of the recital. *Held*, also, that building societies, under their acts of incorporation, are not entitled to take any but real property security; and cannot take collateral security for the payment of loans made upon real property. *The Canada Permanent Building and Savings Society v. Lewis et al.*

BY-LAW.

See JURAT.

1. *Town regulations—Nuisance.*]—*Held*, that the statute 16 Vic., ch. 35, does not authorise the passing a by-law to prevent a nuisance not in itself unlawful. **Re Davis v. Municipality of Clifton*, 236.

2. *What is notice of passing—Opportunity of opposing.*]—A by-law having been passed without the proper number (six) of notices being posted up, but proof of some having been posted being given, and one or more of them having come to the notice of the applicant, *Held*, sufficient.

The applicant being aware of the day of passing the by-law, and having given notice that he intended opposing the same, took no further steps in opposition until making the application to the court to quash it. *Held*, not sufficient. *Parker v. The Municipalities of the United Townships of Pittsburg and Howe Island*, 517.

CERTIFICATE.

See DEED.—CONVEYANCE, 3.

Of Engineer]—*See CONTRACT*.

CHANGE.

Of possession.]—*See ASSIGNMENT*, 4.

Of offices.]—*See STATUTE 20 VIC.*, CH. 22.

Of property.]—*See STATUTE 19 VIC.*, CH. 21.

CHATTLE MORTGAGE.

BONA FIDES.

The plaintiff claimed the goods—the subject matter in dispute—under a chattel mortgage, duly filed. The main question on the trial was the consideration for which the mortgage had been given, in support of which the plaintiff proved that the consideration arose mainly for goods left in the mortgagor's possession, by the plaintiff's grandfather. The jury having, on the trial, found for the plaintiff, the court refused to interfere. *Harrington v. Marsh*, 227.

COGNOVIT.

Filing—Common Law Procedure Act, 1857.]—*Held*, that the entering of a judgment upon a *cognovit actionem*, within the periods respectively limited by the 17th and 18th sections of the Common Law Procedure Act, 1857, is a sufficient compliance with the provisions of those sections. *The Commercial Bank of Canada v. Fletcher*, 181.

COLLATERAL SECURITY.

Right of Building Societies to take.]—*See BUILDING SOCIETIES*.

COMMON LAW PROCEDURE ACT, 1856.

See PROMISSORY NOTE, 2.

1. *Equitable pleas.*]—Upon an action brought for use and occupation, a plea on equitable grounds, that the

defendant entered upon an agreement (not in writing) for a lease for 42 years, under which no rent was to be paid until certain conditions were performed by plaintiffs, which have never been so performed. *Held*, upon demurrer, to be a good legal defence. *The Trustees of The Toronto Hospital v. Heward*, 84.

COMMON LAW PROCEDURE ACT, 1857.

See AMENDMENT.—COGNOVIT.

2. *County Courts*.]—*Held*, that the 25th section of the Common Law Procedure Act, 1857, applies to County as well as to the Superior Courts. *Arnold v. Murgatroyd et al.*, 87.

CONSIDERATION.

See REGISTRY.—BILL OF SALE.—PROMISSORY NOTE, 4.

CONTINUING.

See DAMAGES, 2.

CONTRACT.

1. *Pleading*.]—*Held*, that a contract entered into by two trustees under the school acts, with the corporate seal attached is sufficient, and a plea that it was signed by the two subscribing trustees, without the consent or approbation of the third, *held* bad. *Forbes v. The School Trustees of Section 8, Plympton*, 74.

2. *Liability of corporation—Right to recover*.]—*Held*, that where the plaintiff performed certain public work under contract, not made with the municipality, or with any of its known officers, but merely with persons in their individual capacity assuming to act as a duly appointed

committee, no action lies against the corporation. *Stoneburgh v. The Municipality of Brighton*, 155.

3. *Certificate of Engineer*.]—The new trial granted having again resulted in a verdict for plaintiffs, the court ordered another. (*Coatsworth v. The City of Toronto*.) For facts of this case, see C. P. R., vol. vii.

CONVEYANCE.

See EJECTMENT, 5.

1. *Estate*.]—*Held*, that the words “all my right, interest and estate of, in and to the estate of Garrett Miller,” in a conveyance, passed all the estate of the grantor therein. *O’Neil v. Carey*, 339.

2. *Certificate—Married woman*.]—*Held*, that a certificate of a married woman on the back of a deed, which stated that she had been “duly” examined, instead of the words “apart from her husband,” was insufficient, even although it was proved” as a fact *dehors* the conveyance, that the woman *was* examined apart from her husband. *Stayner v. Applegate*, 451.

CONVERSION.

See TROVER.

CORROBORATION.

See EVIDENCE, 8.

COSTS.

See CRIMINAL CONVICTION, 4.

Ca. Sa.]—See ARREST, 1.—DOWER, 1.

1. *Statute 18 Vic., ch. 69*.]—Where a rule to tax costs had been taken out, 26th February, 1856, under the provisions of 18 Vic., ch. 69, and served and the bill demanded afterwards; the plaintiff not having

produced his bill, the defendant, on the 28th February, 1856, taxed a nominal bill; on the 17th of March, 1857, the plaintiff made up and delivered his bill, and demanded payment, which was refused. In Easter term, 1857, relief was sought by application to set aside the taxation, and all subsequent proceedings, which was enlarged by consent of the parties, till Easter term, 1858. *Held*, that the plaintiff was entitled to succeed, notwithstanding the delay. The statute being passed to confer extraordinary benefit upon persons coming within its provisions. The court will not recognise enlargements. *McDonell v. Farewell*, 54.

2. *Attorney*.]—Costs of suits being in all cases the money of the client. *Held*, that an attorney taking an annual salary in lieu of such costs, was not entitled to tax more than disbursements (which, by his agreement he was entitled to recover from his client) from the defendant in the action, notwithstanding that all such costs were the property of the attorney by the arrangement. *Jarvis v. The Great Western Railway Company*, 280.

COVENANTS.

See DOWER, 2.

COUNTY COURTS.

See COMMON LAW PROCEDURE ACT, 2.

CREDITOR.

See PAROL SALE.

Assignment for benefit of.—*Preferred*.]—*Held*, that the recitals in an assignment for the benefit of creditors, which used the single instead of the plural number, and an affidavit which stated that the “con-

veyance was not for the purpose of enabling the bargainee to hold, &c.,” did not vitiate the instrument. *Tyas et al. v. McMaster*, 446.

CRIMINAL CONVICTION.

COSTS.

Upon an application for a rule to tax the costs of proceedings on indictment under 5 & 6 W. & M., ch. 33, and that they should be allowed to a particular person. The court refused the rule. A side bar rule is granted in England to tax these costs as a matter of course, but this application went further. *Regina v. Gordon et al.*, and *Regina v. Robson et al.*, 58.

CRIMINAL.

See RULE.

CROWN LANDS.

See TRESPASS.—RIGHTS OF PURCHASERS.—TIMBER AGENTS.

Held, that the Crown timber agents have no legal right to dispose of the timber upon lands sold by the Crown lands agents, and that they can in no way affect the rights of such purchaser as against trespassers. The case of *Glover v. Walker*, 5 U. C. C. P., 478, affirmed. *Alexander v. Bird*, 539.

CROWN SURVEY.

Patent.—Uncertainty.]—A patent was issued from the C. L. office, describing the land as “all that parcel or tract of land, being part of the town plot of London, on which the Episcopal Church of England now stands, and containing four acres and two-thirds of an acre or thereabouts, and also lot number twelve in concession C, and lot number thirteen in said conces-

sion of the township of London " The grantee of the Crown had, prior to the issuing of the patent, fenced in more land than the above description covered, and subsequent to their so fencing it in, but prior to the issuing of the patent, a survey was made by instructions of the government, and a portion so fenced was appropriated to the widening of the street. Upon an indictment found, and a verdict thereon for the Crown, *held* that the grantee under the above description was not entitled to the land so fenced in, but the survey subsequently made must prevail. *Hagarty, J., dissenting. Regina v. The Bishop of Huron, 253.*

CROWN RECEIPT.

See REPLEVIN, 5.

DAMAGES.

See BILL OF EXCHANGE.—RAILWAY, 1, 2, 3.—INDEMNITY.

Continuing.]—The defendants, in the construction of their railway, crossed a stream of water which emptied itself on the plaintiff's land, and to allow a passage, they built a culvert, and caused the water to flow as before on to the plaintiff's land, none of said land, however, being taken for railway purposes. The culvert being filled up, the defendants caused, (about six years before the bringing of this action) a drain to be dug, which, with continuations made by the adjoining owners of property, caused the water to be diverted from its natural course and to overflow a portion of the plaintiff's land—and instead of being a benefit, became an injury. The plaintiff waited for six years and then brought an action—claiming damages for a crop injured at the time of the diversion, and as a continuing injury to the land since.

Held, that the damage was not continuing, and that the action should have been brought within six months. *Paterson v. Great Western Railway Company, 89.*

DEBENTURES.

See DEBT.

DEBT.

1. *Interest—Debentures.*]—*Held*, that an action in *debt* is not maintainable for interest *only*, on debentures, the principal not being due. *Lyall v. Mayor, Aldermen, and Commonalty of City of London, 365.*

2. *Upon mortgage—Receipt of one shilling in satisfaction of ejectment.*]—*Held*, that a receipt of one shilling, in full of damages and costs, upon an action in debt, founded upon the covenant in a mortgage, did not operate as a re-conveyance of the estate so as to defeat an action of ejectment brought subsequently upon the same security. *Carter et al. v. McLaurin, 460.*

DEED.

Married woman—Certificate.]—*Held*, that a certificate of examination of a married woman on the back of a conveyance, which did not state that she was examined "apart from her husband," and no proof of that fact being given on the trial, was insufficient. *Stayner v. Applegate, 133.*

DELIVERY.

See REPLEVIN, 1.

DEMURRER.

See MORTGAGE, 2.

DESCRIPTION.

See EJECTMENT, 5.

DEVISE.

1. *Ejectment.*]—The plaintiffs claimed title under a will, by which the testator devised to his widow “1,000 acres of land in Walsingham; and if he had less than 1,000 acres there, then that quantity to be made up to her out of his Zorra lands.” The defendants shewed no title, but contended that to succeed, the plaintiffs must prove that the testator died seised of 1,000 acres more than the land in question in Walsingham, and that the plaintiffs should be non-suited. Upon a motion made on leave reserved, *Held*, that the non-suit should be entered. *Miller et al., executors of Dunn v. v. v.* *Anger*, 80.

2. *Possession—Statute of Limitations.*]—W. S., by will, devised his estate thus: “I give and bequeath unto my well beloved wife, Ruth Shaw, the one-third of lot No. 2, in the 1st and 2nd concessions of the township of Camden: that is to say, the part on which the orchard stands: for the sole use and maintenance of her, the said R. S., during her life. I also bequeath unto my three youngest sons, Absalom, James, and Uriah, the whole of the said lot No. 2, in the 1st and 2nd concessions in the township of Camden, to be equally divided between them after the decease of their mother. The plaintiff claimed one undivided third of of the whole, as eldest brother and heir at law of Uriah. *Held*, that Uriah’s right of entry to the two-thirds, upon which there was no estate for life created, and those claiming under him, accrued upon his majority, and twenty years’ uninterrupted possession by the

defendants had barred that right; and therefore that the plaintiff was only entitled to succeed as to the undivided one-third of the orchard or centre third. *Shaw v. Shaw*, 270.

3. *Sale.*]—A testator devised as follows: “[I give and bequeath to my wife after my decease the proceeds of one-half of all my lands, cattle and other effects of every kind whatsoever to me belonging at the time of my decease, and the other half of my said lands, cattle, and effects of every kind whatever, I leave in the hands of my executrix and executors, to pay all my just debts,” &c. *Held*, that a power of sale, and not the fee, passed to the executors. *Moore v. Power*, 109.

4. A testator died bequeathing his property, both real and personal, to his nephew, but upon certain conditions (which were proved to have been performed,) with this further bequest, that the said J. S. (the devisee’s) mother and my youngest daughter C. shall have a lien or claim upon the said lands and tenements as a home during the time of either of their natural lives, then after their decease the same shall revert to the said J. S., and his heirs for ever. *Held*, that a joint estate for life passed to the testator’s two daughters, remainder to the survivor for her life, with a remainder in fee to the nephew. *Held*, further, the plaintiff’s right of action did not accrue till after the death of the tenants for life. *Scouler v. Scouler*, 1.

DISTRESS.

See REPLEVIN, 2.

1. *Taxes—Municipal laws.*]—*Held*, that taxes collected during the year 1857, which were overdue since

1855, and charged in the assessment roll of 1857 by a resolution of the proper authorities to that effect on the 7th of December, 1857, after the expiration of the usual time (see 18 Vic., ch. 21, sec. 3,) was valid and legal. *McBride v. Gardham*, 296.

2. *Replevin—School rates.*]—*Held*, that a party avowing for distress in the levying of a school rate, the by-law for sanctioning such levy requiring to be passed upon the request or with the consent of certain persons, must shew such request to have been made, or such concurrence or consent obtained. *Held*, also, that upon such avowry, the avowant must set forth the conditions precedent required by law to be complied with before the passing a by-law to levy a rate for school purposes. *Haucke v. Murr*, 441.

DOWER.

1. *Costs.*]—*Held*, that a demandant, who had given a proper and sufficient notice of action, no proof of an offer to assign by the tenant prior to action being given, was entitled to the costs of the action, under 13 & 14 Vic., ch. 58, even in the case of judgment by default. *Hagarty, J., dubitante. Street (demandant) v. Rowe (tenant)*, 213.

2. *Covenants.*]—*Held*, that an action for breach of covenants, running with the land, can only be maintained by the party, between whom and the covenantor there is privity of estate at the time of the breach. *Rowe v. Street*, 217.

3. *Seisin—Voluntary deed fraudulent as against subsequent one for value.*]—A. conveys without consideration to N. W., a lot of land, who takes it, and remains in possession some years and leaves. A.

subsequently conveys to T. W. for value, the same land. Upon a plea of *ne unques seisie que dower*, in an action for dower by the widow of N. W. against T. W.—*Held*, that the first deed, being without consideration, was fraudulent as against the second, and that the claim for dower rested upon the seisin under it, was not sustainable. *Wilson v. Wilson*, 525.

EJECTMENT.

See DEBT ON MORTGAGE.—POSSESSION, 3.—DEVISE, 1.

1. *Conveyance — Description.*]—When two deeds were given to different parties of a lot containing 150 acres, the first covering 50 acres by metes and bounds, the last containing the whole lot, and commencing at the same point as the first, “except fifty acres already sold,” it was *Held*, that the last deed did not prevail against the first, but covered the remaining 100 acres of the lot. *Arner v. McKenny*, 373.

2. *Assignment — Estoppel.*]—One C. B. assigned all his estate and effects for the benefit of his creditors, generally to the defendants. The assignment contained three parties, C. B. being the party of the first part, the defendants of the second part, and “the several other persons whose names and seals are hereunto subscribed and fixed, creditors of the said C. B. of the third part.” No creditor executed the assignment, but the defendants (assignees) admitted part of the plaintiff’s claim by letter. *Held*, that such admission made him a party to the assignment, although he had not executed it, and that they were liable for money had and received. *Held*, also, that as a defendant in ejectment is es-

topped from denying the title of the person through whom he claims, even although that person may have no legal title to the land: so, one who occupies under another may be liable for use and occupation. *Burrows v. Gates et al.*, 121.

3. *Sheriff's sale—Registration—Priority of.*]—*Held*, that a purchaser for value with a registered title under a sheriff's sale of "A.'s" interest in land, was entitled under the Registry Laws to prevail against a non-registered conveyance made by "A." prior to such sale by the sheriff.—*Bruyere v. Knox*, 520.

4. *Taxes—Sheriff's sale.*]—In an action of ejectment brought to try the title to land, the court refused to disturb the verdict upon the ground of misdirection upon points not urged at the trial. *Eades v. McGregor*, 260.

EMBLEMENTS.

See TENANCY.

ENDORSER.

See PROMISSORY NOTE, 6.

EQUITY.

See EVIDENCE, 5.

EQUITABLE DEFENCE.

See PROMISSORY NOTE.

EQUITABLE PLEAS.

See COMMON LAW PROCEDURE ACT, 1856, 2.

EQUITABLE PLEA.

See MORTGAGE, 2.

ESCAPE.

See ARREST, 4.

ESTATE.

See CONVEYANCE.

ESTOPPEL.

See EJECTMENT, 2.

EVIDENCE.

See AGREEMENT. — FORGERY. — AGENCY — ARREST, 3. — PROMISSORY NOTE, 3. — ADMISSIONS. — JOINT CONTRACTORS.

1. *Corroboration—Statute 20 Vic., ch. 61.*]—*Held*, that a conviction of a prisoner for horse-stealing upon the uncorroborated evidence of an accomplice was legal, although the judge did not caution the jury as to the weight to be attached to the evidence. *Regina v. Beckwith*, 274.

2. *Fraud.—Insurance*]—*Held*, that sworn entries in the custom house, of the quantity and value of goods imported by the party claiming damages (occasioned by fire) under a policy of insurance who claimed a much larger amount than appeared to have been imported during the period claimed for, were evidence to go to the jury as a measure of damages. *Lazare v. The Phoenix Insurance Co.*, 136.

3. *Misdirection.—Equity.*]—One R. F. transferred a schooner to the defendant, as trustee, to sell and pay certain creditors (himself among the number) debts due by him to them. A memorandum of defendant's was proved on the trial, admitting the receipt of certain moneys on this account, and appropriating it proportionately to the creditors. Upon an action brought to recover the amount so admitted

the defendant's counsel contended that the transfer was in trust, and the remedy must therefore be in equity. *Held*, that the defendant had admitted the receipt of a certain amount, and that the action was properly brought. *Park v. Berczy*, 173.

EXECUTOR.

See PERSONALTY.

FACTOR.

Lien.]—*Held*, that a factor has no lien on goods consigned to him, until they actually come into his possession. *Clark v. The Great Western Railway Company*, 191.

FI. FA.

See ASSIGNMENT, 4.

Goods—Return of Nulla Bona by mistake—Sheriff.]—Where a sheriff returns writs of *fi. fa.* goods in his office *nulla bona*, under a mistake of his deputy, that a water power held by lease was not saleable thereunder, but required a *fi. fa.* lands, the court allowed the return to be amended upon payment of the damages occasioned by the mistake, and of the costs of the application. An important reason for so doing was, that they could place the subsequent executions in as good a position as they were before the mistake occurred. *Bull v. King*, and *Boomer v. King*, 474 & 476.

FILING.

See COGNOVIT.—PLEADING, 7.
FORGERY.

Evidence.]—*Held*, that statements made by a prisoner to the parties who arrested him, he having been

previously told on what charge he was arrested, were evidence. *The Queen v. Tufford*.

FRAUD.

See EVIDENCE, 3.

HIGHWAY.

See RAILWAY, 2, 3.

INDEMNITY.

Damages.—Measure of.]—*Held*, that the *value* of goods sold under execution upon a judgment recovered upon a covenant in a mortgage, against which the plaintiffs held a bond of indemnity from the defendants, did not form the measure of damages. *Held* also, that the right of action accrued upon the bond immediately upon the defendants making default on the mortgage, and it was not necessary to shew a payment to recover. *Raymond et al. v. Cooper et al.*, 388.

INNKEEPER.

Lien.]—*Held*, that an innkeeper has only a lien, for the keep of horses, on the property of a guest. *Neale v. Crocker*, 224.

INSURANCE.

See EVIDENCE, 3.

Of Mortgagor's interest.]—*See* REGISTRATION OF VESSELS.

INSUFFICIENT DESIGNATION OF COMMISSIONER.

See JURAT.

INTEREST.

See DEBT.

See TRUSTEE.

JOINT CONTRACTORS.

1. *Evidence.* — *Amendment by striking out names.*]—*Held*, that the certificate of registration of vessels under 8 Vic., ch. 5, is the legal evidence by which ownership can be proved, and upon an action on a joint contract, against more than one defendant, the evidence failing in proof as to one, a nonsuit was ordered, the recent decision under the English Common Law Procedure Act not permitting the striking out of a defendant's name in such case. *Bochus v. Shaw et al.*, 391.

JURAT.

Insufficient designation of commission.—*By-law.*]—*Held*, that a signature in the jurat of an affidavit, without the addition of "a commissioner, &c.," was insufficient. *Held* also, that an applicant against a by-law should state that he is a resident in the township, or has an interest in the provisions of the by-law. The commencement of an affidavit, "I, J. B., of the township of B.," not being sufficient. *Babcock v. The Municipal Council of The Township of Bedford*, 527.

JUSTICE OF THE PEACE.

Return of conviction by.—*Penalty under the statute.*—*Proof*]—*Held*, that a justice of the peace is liable under the statute to a separate penalty of £20 for each conviction, of which a return is not properly made to the quarter sessions; and, that an action for the penalty would lie, on proof of the conviction and fine imposed, although no record thereof had been made by the justice. *Andrew Donagh quæ tam. v. John Longworth, Esq.*, 437.

LEASE.

Re-entry—*Legal Estate.*]—Upon

a lease purporting to be made by "R. W." as attorney for "A. H. E. H.," reserving a right of re-entry "by the said R. W. into the demised premises," not saying *as such attorney*—*Held*, that no right of entry was reserved, the court observing that "It is impossible to uphold the reservation of a right of re-entry to a stranger to the legal estate." *Hyndman v. Williams*, 293.

LEGAL ESTATE.

See LEASE.

LIABILITY.

Of Corporation.]—*See* CONTRACT, 2. *Of an incoming partner to pay the debts of his Co-partners.*]—*See* PARTNERSHIP. *Of Railway Companies to maintain fences on their Roads.*]—*See* RAILWAY COMPANY.

LIEN.

See STORAGE.—VENDOR.—FACTOR.—INNKEEPER.

LIMITATIONS.

See REAL ESTATE.

LIMITED LIABILITY ACT.

See PROMISSORY NOTE, 1.

LOTTERY.

Statute 12, Geo. II., ch. 28.]—*Held*, that a sale of land by lot in which there were two prizes, came within the imperial statute 12 Geo. II., ch. 28, and that statute is held to be in force in this country, under the authority of the co-ordinate jurisdiction of the Queen's Bench, in *Cronyn v. Widder*. *Marshall v. Platt*, 189.

MANDAMUS.

See RAILWAY, 1.

MARRIED WOMAN.

See DEED.—CONVEYANCE, 3.

MEASURE OF.

See INDEMNITY.

MILL-DAM.

Right of party to flow of stream—Obstruction.—“W.” (the plaintiff) in an action for damages for the injury done to his mill-dam, proved that “E.” (the defendant) owned a mill-pond and dam about a-half or three-quarters of a mile from his (“W.’s”) on the same stream, and that he had his gate open some twelve or fifteen inches, the night the accident happened. The defendant proved that the plaintiff’s gates were all closed, and the splash boards up at the time, and after the accident. It also appeared in evidence that there had been heavy rains for some days previous. *Held*, that the opening of defendants’ gates (unless they admitted a larger quantity than would naturally flow down the stream) would not render him liable for an accident to the plaintiff’s dam; and that it was plaintiff’s duty to guard against any natural flow of the stream; and further, that unless the plaintiff let the water flow faster than it was supplied by natural causes, he was not liable for damages resulting from such flow. *Wegenast v. Ernst et al.*, 456.

MISDIRECTION.

See AGENCY.—EVIDENCE, 5.

MORTGAGE.

See ASSIGNMENT, 2.

Equitable Plea — Demurrer.] — Upon an action brought on a covenant in a mortgage given by the defendant to the plaintiff, being for the balance of a lot purchased by defendant from plaintiff, the defendant pleaded that one “L.” had commenced a suit in Chancery against one J. B., together with plaintiff and defendant, founded on a contract made by said “J. B.” before the conveyance to defendant, for the sale to him of the same land. *Held*, bad, on demurrer, as for any thing therein contained, the defendant bought with the knowledge of “L.’s” claim. *Boyes v. McGregor*, 244.

MORTGAGEE.

Assignees.]—*Held*, that assignee of a second mortgagee was entitled to prevail in ejectment against the mortgagor or his assignor. The legal estate being in third parties not affecting their rights. *Reid v. McBean*, 246.

MORTGAGOR.

Considered owner when Registered.] See REGISTRATION OF VESSELS.

MUNICIPAL LAWS.

See DISTRESS, 2.

MUNICIPAL CORPORATION.

Statute 14 & 15 Vic., ch. 5. — *Held*, that the township of Waterloo was liable under the statute 14 & 15 Vic., ch. 5, for its share of the debts of the Guelph and Dundas road incurred by the County of Waterloo, (of which it formed one township,) while that county was united to the counties of Wellington

and Grey; notwithstanding, too, that an arbitration took place between those counties upon their separation, by which it was determined that "Wellington" should assume the liability of the former joint counties. *Held* also, that interest, on the ascertained debt, was recoverable, it being not interest upon interest, but interest on money paid, or to be paid, for the defendants. *The Municipal Council of the County of Wellington v. The Municipality of the Township of Waterloo*, 358.

NONSUIT.

Held, that when a nonsuit is granted at the trial, leave cannot be reserved to move to enter a verdict without the defendant's consent. *Sutor v. McLean*, 200.

NOTICE.

See PROMISSORY NOTE, 6.—PROMISSORY, 8.

Of passing by-law.] — See BY-LAW, 2.

NUISANCE.

See BY-LAW, 1.

Agent.]—*Held*, that a party cannot justify as agent of another for maintaining a public nuisance. 2ndly, that twenty years' user will legitimate an easement affecting private property, but not a nuisance; and thirdly, that persons having come to live within the scope of a nuisance after the same had been created, did not prevent their complaining of it as a public nuisance. *The Queen v. Brewster and Cook*, 208.

OBSTRUCTION.

See MILL-DAM.

OPPORTUNITY OF OPPOSING.

See BY-LAW, 2.

PAROL SALE.

Creditor.]—*Held*, that a sale of goods by parol without any actual delivery and change of possession was void as against subsequent creditors. *Williams v. Rapelje*, 186.

PATENT.

See CROWN SURVEY.

PARTNERSHIP.

See PROMISSORY NOTE, 9.

Liability of incoming partner to pay the debts of his co-partners.]—*Held*, that an incoming partner, who as between himself and co-partners entered into a joint liability (with notice to the creditor,) as well for prior as subsequent debts, was liable for debts contracted before he became a member of the firm, contrary to the general principle of law. *Hine et al. v. Beddome et al.*, 381.

PENALTY.

UNDER THE STATUTE.

See JUSTICE OF PEACE.

PERSONALTY.

Executor.]—*Held*, that an executor is entitled to take the personal property of the testator at its value for a debt due by the estate to him, and a purchase made by an executor at a public auction of the testator's personal estate, in lieu of money due him, held valid. *Yost v. Crombie*, 159.

PERSONAL LIABILITY.

Of Secretary giving note.]—See PROMISSORY NOTE, 10.

PRESPECTIVE RIGHT.

See PLEADING, 2.

PLEADING.

See PROMISSORY NOTE, 2.—REPLEVIN, 3.—SCHOOL CONTRACT.—CONTRACT, 1.—POSSESSION, 3.

1. *Perspective right.—Possession.*]—In an action brought to try the right to water, the defendant by his plea admitted that he had raised his dam to a greater height than he was legally entitled to do, but denied the consequences arising from such act. Upon demurrer, *held* good. *Tucker v. Perin*, 63.

2. *Filing, Service.—Held*, that the filing a plea without the service of a copy is not a nullity, but an irregularity; and a judgment signed in such a case without a prior application to the court held irregular. *Watkins v. Fenton et al.*, 289.

POUNDAGE.

See SHERIFF'S FEES.

POSSESSION.

See REGISTRATION, 1.—PLEADING, 2.—DEVISE, 3.

Ejectment—Pleading.]—*Held*, that proof of a paper title is *primâ facie* sufficient to maintain trespass *quare clausum fregit*. *Held*, also, that under the pleas “not guilty” and “the close not the plaintiff’s,” it is open to the defendant to prove that the trespass was not committed on the lot upon which it was alleged to have been committed. *Ball v. Young*, 231.

PREFERRED.

See CREDITORS.

PRESENTMENT.

See PROMISSORY NOTE, 8.

PRINCIPAL.

See AGENT.

McC. & Brother, acting as agents for L. T. & P., purchased a load of coal, without stating to the vendor that they were acting as agents, and upon receipt of the coal, sent in payment a draft accepted by their principals, in which they signed themselves “agts.” Upon an action brought against them as principles, *held*, that they were liable as such. *Reid v. McChesney*, 50.

PRIORITY.

Of registration]—See EJECTMENT, 7.

PROCEEDINGS.

In]—See APPEAL.

PROMISSORY NOTE.

1. *Limited Liability Act.*]—Upon an action brought on a promissory note and bill of exchange against two of the special partners of a partnership formed under the limited liability act (12 Vic., ch. 75) who had jointly made the note and accepted the bill for the accommodation of the general partner. The defendant pleaded a prior judgment recovered upon and taken in full satisfaction of all the causes of action in the declaration mentioned, against the general partner alone. *Held*, that the recovery of the judgment against one of several joint contractors, operated as a merger at law of the inferior remedy of action for the same debt, and that the plaintiff was not entitled to succeed. *Hollowell v. MacDonell et al.*, 21.

2. *Pleading—Common Law Procedure Act, 1856.*—A declaration stating that defendant falsely, deceitfully, fraudulently, and wilfully represented the maker and endorser (without naming them) of a promissory note, to be good. *Held*, bad, on demurrer, for want of sufficient certainty. *Newman v. Kissock*, 41.

3. *Evidence—Release of.*—One A. holding a promissory note endorsed by defendant, agreed with the maker that upon payment of an extra amount of interest he would take another note at a longer date; all the extra interest except \$3 was paid. The note being then sent, was refused, on account of the non-payment of the balance of interest. The maker of the note afterwards declined giving the note. Upon an action brought by the holder against the endorsee of the original note, *held*, that he was released. *Arthur v. Lier*, 180.

4. *Set-off—Consideration—Equitable defence.*—*Held*, 1st—That a plea of set-off by the endorsees against the holder, was no defence either at law or equity, upon a promissory note given for the accommodation of the endorser. 2nd—That the endorsee of an overdue bill or note is liable to such equities only as attach to the bill or note itself, and to nothing collateral due from the endorser to the maker, or endorsee to payee. 3rd—That the endorsee (without value) is entitled to recover on a bill or note if any intermediate party is a holder for value. *Wood et al. v. Ross et al.*, 299.

5. *Waiver of the right to sue thereon—Collateral security.*—E. holding B.'s promissory note for £173 13s. 4d., agreed to take collateral security by mortgage on road stock, and give one year's time on the note. B. mortgaged the stock and

assigned it to E., but for two years instead of one. E. refused to carry out this arrangement, and commenced an action upon the note, at the same time holding the security, and refusing to transfer it. The judge at the trial having ruled that the assignment as pleaded was no bar to the action, a new trial was ordered without costs, the court holding that it was a point for the decision of the jury, whether E., by retaining the security, did not consent to the two years asked in the assignment thereof, and if the pleadings did not raise the point, they could be amended at any time so as to do so. *Evans v. Bell*, 378.

6. *Endorser—Notice.*—Where the notary (who had protested the promissory note sued upon) under a plea of no notice, stated first that notice had been given, but upon referring to his book of notarial entries, and finding no notarial entries charged, stated that he felt "rather staggered" as to his having sent the notice. *Held*, that the jury were warranted in finding for the defendant. *McDougall v. Wordsworth*, 400.

7. *Second endorser liable to first thereon—Under what circumstances.*—“W.,” the first endorser of a promissory note, sued “M.,” the second endorser, and upon the trial proved that the note had been given by the maker, one “C. R.,” upon the dissolution of a partnership between himself and the plaintiff as security to the plaintiff for the amount of the note due to him upon such settlement, and with the understanding that an endorser should be given. “M.” endorsed the note after the plaintiff, with notice of these facts. *Held*, that he was liable to the prior endorser for the amount. *Wordsworth v. McDougall*, 403.

8. *Presentment—Notice.*]—*Held*, that a promissory note made payable at a particular place, and “not otherwise or elsewhere,” did not require special presentment, it being proved to have been on the day it matured at the place where it was made payable: and the following notice to the endorser held sufficient: “Strathroy, 13th of October, 1857. John Ham Perry, Esq., Whitby, C. W. Sir, a certain promissory note for three hundred and fifty pounds, and interest, given on the 10th day of April last, in favour of John Ham Perry, and endorsed by you, and signed B. F. Perry, in favour of Hiram Dell, of Strathroy, fell due on the 10–13th instant; you will, in consequence of non-payment, be held responsible for all costs or damages for non-payment.” *Harris et al. v. Perry*, 407.

9. *Satisfaction—Partnership.*]—Plaintiff holding defendant’s note (not negotiable) payable on demand for £500, in transactions with one Reed (a partner of defendant) gave it to Reed, taking in return his note for £1,000, for this and other transactions. In dissolving partnership, it was arranged that this £1,000, or note of Reed’s, should be paid by the defendant. Reed being subsequently called upon for payment obtained defendant’s cheque for £500, and returned defendant’s original note for £500 to plaintiff in payment of the note for £1,000. Upon an action brought for the amount of the note of £500, the defendant pleaded satisfaction thereof by the taking of Reed’s note for £1,000. *Held*, that the facts did not amount to a payment, and that the defendant was liable. *Booth v. Ridley*, 464.

10. *Given by secretary of a company—Personal liability thereon.*]—

G. being the secretary of an Insurance Company, gave the following note for a loss sustained by an insurer therein:—

“£1,000 currency.

“Sixty days after date I promise to pay to the order of James S. Wood, Esq., of Colborne, the sum of one thousand pounds currency, value received by the Ontario Marine and Fire Insurance Company, payable at the Gore Bank in Hamilton.

“(Signed), “C. Horatio Gates, “Secretary O. F. Company.”

Held, that he was personally liable thereon, and a plea that the same was taken for a liability of the company and with the understanding that they were to pay the same held bad, as setting up a contemporaneous verbal agreement, to vary the express terms of a written contract. *Held*, also, that the sixty days given by the note, the policy being at the same time marked “cancelled,” was a sufficient consideration therefor. *Armour v. Gates*, 548.

PROOF.

See JUSTICE OF PEACE.

RAILWAY.

1. *Highway—Damages.*]—*Held*, that a railway company is not bound to maintain any but the usual and direct road for access and egress to and from their station; and a passenger, taking an indirect road which had not been appropriated to the purposes of a footway, cannot hold the company responsible for damage or accident occasioned thereby. *Walker v. The Great Western Railway Company*, 161.

2. *Company—Their liability to maintain fences on road—Responsi-*

bility of owners of adjoining land.]—*Held*, that a railway company is not bound to maintain and keep up fences along their track, except as between them and the owners of the adjoining property; and when cattle were allowed to pasture upon a neighbour's land, and from thence strayed on the railway track, and were killed, *Held*, that the railway company were not responsible. *McLennan v. The Grand Trunk Railway Company*, 411.

3. *Damages—Mandamus.*]—*Held*, that a purchaser of land is not entitled to damages for an injury committed (by the construction of a railway through the land) prior to the time of his becoming possessed, and a mandamus to compel the railway company to appoint an arbitrator to assess such damages, was refused. *Partridge v. The Great Western Railway Company*, 97.

4. *Damages—Highway.*]—The plaintiff owned certain land on Railway and Inchboy streets in the city of Hamilton, the former of which streets communicated northwards with Burlington Bay. The defendants owned the land along the shore of the bay and on both sides of Railway street, as far as the damage complained of extended, and in the construction of their depots cut away the end of the street at the shore of the bay, making an embankment and preventing egress to the northwards. The plaintiff brought an action for the injury done. *Held*, that no private injury was proved, and no damage could therefore be claimed. *Jarvis v. The Great Western Railway Company*, 115.

REAL ESTATE.

Limitations.]—Forty years is

allowed for the bringing of actions for land or rent in case of disabilities. The term of forty years, however, is not a universal bar. Twenty years forms the regular bar. But the twenty years run only from the time the first right accrued. *Petrie et al. v. Mailloux*, 334.

RECEIPT

Of one shilling in satisfaction of debt on mortgage.]—See DEBT ON MORTGAGE.

RECOGNISANCE.

See BAIL.

RE-ENTRY.

See LEASE.

REGISTRY.

CONSIDERATION.

Assignment.—Possession.]—*Held*, that assignments, for the general benefit of creditors, come within the provisions of the statute 20 Vic., ch. 3, and must be registered under that act, unless accompanied by an immediate delivery, and an actual and continued change of possession. *Maulson et al. v. Joseph*, 15.

REGISTRATION.

See ASSIGNMENT OF STOCK.

REGISTRATION OF VESSELS.

See EJECTMENT, 7.

Mortgagor considered owner when registered.—Insurance of mortgagee's interest.]—Upon an action for insurance upon a vessel under the usual interim receipt, *Held*, that the mortgagor of a non-registered vessel had not such an interest as was saleable under a *fi. fa.*, the 23rd sec. of the statute 8 Vic., ch. 5, only declaring that the registered owner, although

he shall have mortgaged the vessel, shall be considered to be the owner thereof; and that by a purchase under a *fi. fa.* of the mortgagor's interest in a *non-registered vessel*, the legal estate did not pass. The plaintiff, at the trial, claiming as owner under a sale as above stated, and the judge ruling against him, applied, and was allowed, to prove his interest as mortgagee. Upon a motion for nonsuit upon that ground, *held*, that it was a matter in the discretion of the judge at *nisi prius* to permit such a variance in line of proof, and the defendants not shewing themselves damnified by the exercise of this discretion, a nonsuit was refused. *Scatcherd v. The Equitable Fire Insurance Company*, 415.

RELEASE OF.

See PROMISSORY NOTE, 3.

REPLEVIN.

See DISTRESS.

1. *Delivery.*]—The plaintiff entered into an agreement with one McGowan, for the purchase of a quantity of timber, upon certain terms. The plaintiff failed in payment of the price agreed upon. McGowan afterwards (the money being tendered) refused it, and did not deliver the timber, but sold and delivered it to one Cook. Upon replevin brought, *Held*, that no delivery having been made to plaintiff—he could not succeed. *Henry v. Cook*, 29.

2. *Distress.—Tenancy.*]—Where a tenant, after the determination of a lease for a specific term, continued to hold possession for five months, paying by agreement £75 for the first three, and the same amount for the last two months, and afterwards occupied without

any specific agreement, *Held*, that no definite tenancy was created by the last overholding. *McInnes v. Stinson*, 34.

3. *Pleading.*]—*Held*, that the plaintiff in a replevin can recover for such portion of the property replevied, as he can prove title to; and that the plea of not possessed is divisible. *Henderson v. Sills*, 68.

4. *Taxes.*]—Upon replevin to recover certain goods and chattels, seized for taxes, the plaintiffs contended, first, that their land was not assessed at the average value of land in the vicinity. 2nd. That no proper notice was given of the assessment. And, 3rd, that the roll was not completed within the proper time. The defendant justified under a letter written by the plaintiff's solicitor in the following words: "In reply to yours of the 15th instant, addressed to the managing director of this company, I am directed to inform you that the only real property owned by the company, in the township of Maidstone, consists of the roadway of 106 acres, and 17 acres of extra or waste land. I have not the rate at which this land has been hitherto assessed, but I presume that the average value of land in the locality cannot exceed ten pounds per acre." They also proved a notice of assessment delivered the 9th of July, 1856. *Held*, that this letter did not fix £10 as the average value of the land, but only asserted that the value could not exceed that sum, and that the notice, being served after the time for the revision of taxes had expired, was too late; under which they had assessed the plaintiff's land at £10 per acre, while the average value of the land through which the railway went, was £1 10s. *Great Western Railway Company v. Ferman*, 221.

5. The plaintiff sold one "F."

certain goods, taking notes in payment, a written agreement being entered into that unless the notes were promptly paid, the property did not vest. F. sold the property to defendant, giving him notice of the plaintiff's claim. The notes not being paid, the plaintiff replevied the goods. Upon a special case submitted to the court, *held*, that the plaintiff was entitled to recover. *Weeks et al. v. Lalor*, 239.

6. *Crown receipt*.—*Statutes 4 & 5 Vic., ch. 110, and 12 Vic., ch. 31.*—*Held*, that a receipt for the purchase money of a lot of land from the Crown under 4 & 5 Vic., ch. 100, entitled the purchaser to maintain trespass against any wrong doer upon the property, or replevy any property taken therefrom. *Deeds v. Wallace*, 385.

REPLEVYING.

Trespass de bonis asportatis against a sheriff for.—“A.” (a sheriff) upon an action in trespass *de bonis asportatis*, brought against him as such sheriff, by his plea admitted the goods to be those mentioned in the writ, and that they were replevied by him from “B.” (a third person,) without alleging property in the plaintiff, or that the writ directed him to replevy from the plaintiff. *Held*, bad, for not shewing property or possession in the plaintiff, or directly identifying him with the action. *Anderson v. McEwan*, 532.

RESPONSIBILITY.

Of owners of land adjoining railway.—*See RAILWAY COMPANIES.*

RETURN.

Of conviction by.—*See JUSTICE OF PEACE.*

Of nulla bona by mistake.—*See FI. FA. GOODS.*

RIGHT.

To recover.—*See CONTRACT, 2.*

Of party to flow of stream.—*See MILL-DAM.*

Of purchasers.—*See CROWN LANDS.*

RULE.

Criminal Appeal Act.—Promulgated in Hilary Term, 370.

SALE

See DEVISE, 2.

Sale of goods under fi. fas—*Application of proceeds of*—*Sheriff's liability for money had and received.*—M., a sheriff, seized and sold under execution, goods and chattels to the amount of £3823 12s. 2d., the terms of the sale were cash, but it was understood and agreed that the purchaser might make such arrangements as he could with the execution creditors, all of whom, except the last ten, required cash; they agreed to give time, and take notes. In the settlement £2,762 16s. was paid to the sheriff, and notes were given for £1,146 17s., making in all £86 1s. more than the amount of the purchase. Upon an action brought against the sheriff for that amount, he proved that he had paid upon the executions all moneys received except £165 7s. 10d., and he claimed £442 2s. for fees and poundage. *Held*, that he was not liable under the circumstances, not being shewn to have received more than he should have. *Semble*, why was the deputy sheriff joined in the action? *Kennedy v. Moodie et al.*, 544.

SATISFACTION.

See PROMISSORY NOTE, 9.

SCHOOL RATES.

See DISTRESS, 3.

SCHOOL CONTRACT.

Pleading.]—Upon an action brought on a contract, entered into by two of three trustees of a school section, under their corporate seal, plea, "*non est factum*," the jury having found for the defendants, a new trial was ordered. *Forbes v. The School Trustees, section 8 of Plympton, 73.*

SECOND ENDORSER.

Liable to first on note.]—See PROMISSORY NOTE, 7.

SECRETARY.

Of company—Note given by.]—See PROMISSORY NOTE, 10.

SEISIN.

See TENANCY BY CURTESY.—DOWER, 3.

SERVICE.

See PLEADING, 7.

SET-OFF.

See PROMISSORY NOTE, 4.

SHERIFF.

See ARREST, 4.—FI. FA. GOODS.

Trespass — Attachment.]—The plaintiff owned a stock of goods and some furniture and shop fixtures at "B.:" he sold out to one "S.," taking from him a chattel mortgage in security. S. continued to carry on business, bringing other goods into the store, till he became

involved, and absconded. Upon an attachment being placed in the sheriff's hands, he seized all the property in the store. *Held*, that the property could easily be distinguished, and that the sheriff was liable for trespass. *Boys v. Smith, 248.*

SHERIFF'S LIABILITY.

For money had and received.]—See SALE OF GOODS UNDER FI. FA.

SHERIFF'S SALE.

See EJECTMENT, 4, 7.—TAXES, 1.

SHERIFF'S FEES.

Poundage.]—Where a levy had been made by a sheriff under a writ of *fieri facias*, but before sale the writ and all proceedings thereon were set aside, *Held*, that the sheriff was not entitled to poundage. *Walker v. Fairfield, 95.*

STATUTE.

Of Limitations.]—See DEVISE 3.

12 Geo. II., ch. 28.]—See LOTTERY, 4 & 5 Vic., ch. 110, and 12 Vic., ch. 31.]—See REPLEVIN, 6.

18 Vic., ch. 69.]—See COSTS, 1.

14 & 15 Vic., ch. 5.]—See MUNICIPAL CORPORATION.

20 Vic., ch. 61.]—See EVIDENCE, 8.

1. 20 Vic., ch. 22—*Change of office under.*]—*Held*, that the statute 20 Vic., ch. 22, authorises the ministers named therein, holding any office of emolument under the Crown, to change their appointment more than once within a month, without re-election. *Macdonell v. Macdonald, 479.*

2. 19 Vic., ch. 21—*Change of property by.*]—*Held*, that the taking

possession by the B. & L. H. R. W. Co., under 19 Vic., ch. 21, of the property previously owned by the B. B. & G. R. Co. operated to transfer the same into the former, so as to prevent its being seized under a *fi. fa.*, even although the goods were in the process of transportation from England to their line of road. *The Buffalo and Lake Huron Railway Co. v. Corbett*, 536.

STORAGE.

Lien.]—*Held*, that a warehouseman has only a lien on the property stored for the storage of grain in his warehouse, and not for the general charges thereon,

Holcomb & Henderson stored a quantity of wheat in the defendant's warehouse at "K.," and for the charges incurred thereon, gave them a draft on their own firm in "M.," which the defendants accepted in payment, and receipted the bill. The draft was presented and accepted, but during its currency H. & H. failed. The defendants then refused to give up the remainder of the wheat, (having already shipped a large portion of it to Montreal,) claiming a lien for their general charges. *Held*, that their legal lien was suspended during the currency of the bill. *Renald v. Walker*, 37.

STRIKING OUT PARTIES.

See AMENDMENT.

STRANGERS.

Right of Building Societies to take collateral security.]—See BUILDING SOCIETY.

SURRENDER.

See TENANCY BY CURTESY,

TAXES.

1. *Sheriff's sale.*]—*Held*, that the plaintiff in ejectment brought upon a sheriff's title under a sale for taxes, must prove that the writ to sell was grounded on the treasurer's return declaring the assessments to be eight years in arrear on this particular tract of land. *Errington v. Dumble*, 65.

See REPLEVIN, 3.—EJECTMENT, 4.—DISTRESS, 2.

TENANCY.

See REPLEVIN, 2.

Curtesy—Reversion—Surrender—Seisin.]—*Held*, that the husband of a deceased wife cannot be tenant by the curtesy, except of lands of which his wife was seised of such an estate as that her issue by him would inherit, as heir to her, and that as between the reversioner and tenant by the curtesy, a conveyance from the tenant by the curtesy operates as a surrender of the life estate, and that the freehold in law vests in the assignee before entry. And the lesser estate would, by operation of law as between them, merge in the greater, and the assignee's right of enjoyment would be immediate, as if the tenant for life had died. *Richards, J.*, dissenting. *Wigle v. Merrick et al.*, 307.

Emblements—When entitled to them.]—Where a party entered into possession, and sowed a crop upon a verbal understanding that he should have the products thereof, but no special time for occupation was mentioned. *Held*, that a sufficient tenancy was created to entitle him thereto. *Mulherne v. Fortune et al.*, 434.

TIMBER AGENTS.

See CROWN LANDS.

TOWN REGULATIONS.

See BY-LAW.

TRESPASS.

See SHERIFF, 1.*De bonis asportatis against a sheriff for replevying.*—*See* REPLEVING.

Crown lands.]—*Held*, that a purchaser from the Crown who held only a receipt for a portion of the purchase money, without a license of occupation under the 6th section of 16 Vic., ch. 159, cannot maintain trespass against a wrong-doer in respect of such land. *Held* also, that to maintain trespass by reason of possession (under such receipt) it must be actual and continuous. *Henderson v. McLean*, 42.

TROVER.

Conversion—Interpleader.—*Held*, that where the claimant, under an interpleader order, (after first directing a sale, and then countermanding it,) accepted part of the proceeds of the sale of the goods, he thereby adopted the sale, and cannot hold the execution creditor liable for a conversion. *Appelby v. Withall et al.*, 397.

VENDOR.

Lien — Assignment.]—One D. McD. being the owner in fee of certain land, sold and conveyed the timber and cordwood thereon to A. A. McG., who took possession, giving

his promissory note as part payment of the purchase money; he then converted the timber into cordwood and sold it to one S., and afterwards absconded. On the 8th September, 1857, the defendants in this action, recovered a judgment against McG. and placed a writ of *fieri facias* in the sheriff's hands, who levied on the cordwood, McD's assignees (he having in the mean time made an assignment) claiming a lien upon it for the unpaid purchase money, and on the 18th November, 1857, advertised and sold it by public auction to the plaintiff. *Held*, that McD. had absolutely parted with his lien, and that the sale was invalid. *Wyatt v. The Bank of Toronto*, 104.

VOLUNTARY DEED.

Fraudulent as against a subsequent one for value]—*See* DOWER, 3.

UNCERTAINTY.

See CROWN SURVEY.

Under what circumstances.]—*See* PROMISSORY NOTE, SECOND ENDORSER LIABLE TO FIRST ON NOTE, 7.

WAIVER.

Of the right to sue.]—*See* PROMISSORY NOTE, 5.

WHEN.

Entitled to emblements.]—*See* TENANCY, 2.

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